SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

DEAN FOODS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

FEDERAL TRADE COMMISSION, Petitioner

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY, Respondents

EMERGENCY PETITION FOR PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER, AND OTHER RELIEF IN AID OF THE JURISDICTION OF THE COURT—Filed December 30, 1965.

The Federal Trade Commission, acting through its attorneys, petitions this Honorable Court for a preliminary injunction and other relief in aid of the jurisdiction of the Court, pursuant to 28 U.S.C. § 1651 (a).

I. Respondents

1. Dean Foods Company (hereafter "Dean") is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 3600 River Road, Franklin Park, Illinois. Dean, directly and through various wholly-owned subsidiaries, is a large, regional producer of packaged milk, other dairy products and non-dairy food products. The company operates nine dairy products plants, seven other food processing plants, [fol. 2] and a number of sales offices. Its products are distributed in parts of Illinois, including the area in and around Chicago, Illinois; parts of Kentucky, Michigan, Tennessee, and Wisconsin; and substantially the entire States of Arkansas and Indiana. Dean is approximately the twelfth largest dairy company in the United States, with 1964 sales of $73 million. Dean is the third or fourth largest seller of packaged milk in and around Chicago, Illinois.

Dean carries on business in the Seventh Circuit within the meaning of Section 11(c) and the Clayton Act and Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c), 45(c). It is engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

2. Bowman Dairy Company (hereafter "Bowman"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 140 W. Ontario Street, Chicago, Illinois. Bowman, directly and through various subsidiaries, is a large, regional producer of packaged milk and other dairy products. The company operates eight packaged milk plants, three ice cream manufacturing plants, three other dairy products processing plants, and a number of distribution facilities and sales offices, including eight distribution branches in and around Chicago, Illinois. It distributes its products in parts of Illinois, Wisconsin, Iowa, Michigan, Ohio, Indiana and Kentucky, but the bulk of its sales are [fol. 3] made in and around Chicago, Illinois. Bowman is approximately the eleventh largest dairy company in the United States, with 1964 sales of about $77 million. Bowman is the largest or second largest seller of packaged milk in and around Chicago, Illinois.

Bowman carries on business in the Seventh Circuit within the meaning of Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c), 45(c). It is engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

II. Jurisdiction

3. The respondents entered into a "Purchase Agreement" (Exhibit B) with one another, on December 13, 1965. This agreement provides that Bowman sell to Dean, Bowman's accounts receivable; inventories; plants and equipment; leases and leasehold interests; the name "Bowman" and other trademarks and trade names; "the benefit of all relationships with suppliers and customers"; all customer and supplier lists; and various other tangible and intangible assets. By the terms of the agreement, the transfer of legal title to these assets was scheduled to take place on

January 3, 1966, but by agreement of counsel this date is now January 10, 1966.

4. The Federal Trade Commission, having reason to believe that the agreement between the respondents violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, on December 20, 1965, issued its complaint against the respondents. Exhibit A.

[fol. 4] 5. The United States Court of Appeals for the Seventh Circuit is a Court of Appeals having jurisdiction to review any final order entered by the Federal Trade Commission in respect to the merger agreement between the respondents. Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), provides that review may be obtained in "any circuit within which such violation occurred or within which such person resides or carries on business"; Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c), provides that review may be obtained "within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business." Each respondent carries on business within the Seventh Circuit and the violation occurred, and the acts or practices in question took place, within the Seventh Circuit.

6. The "all writs" statute, 28 U.S.C. § 1651(a), authorizes the Courts of Appeals to "issue all writs necessary or appropriate in aid of their respective jurisdiction." The Federal Trade Commission alleges, as described below in greater detail and supported by the affidavits annexed hereto, that the imminent consummation of this acquisition will prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits. The effect of consummation of the acquisition thus may well be to prevent the Commission from issuing any effective final [fol. 5] order for this Court to review and to hinder the Court's issuing its own order in the premises. The Comission therefore petitions this Court to exercise its discretion under § 1651(a) to issue an appropriate writ in aid of its jurisdiction.

III. The Probable Anticompetitive Effects of the Merger

7. As demonstrated in the affidavit of Scott A. Walker, Federal Trade Commission economist and an expert on the dairy industry, Exhibit C, this acquisition will have serious anticompetitive effects on the packaged milk business in the Chicago Area. Dean, the third ranking firm in that area will eliminate its largest single competitor. The combined market shares of the merging firms total about 23%, a figure nearly as large as the 30% combined market shares which the Supreme Court held to raise the presumption of illegality, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364-7 (1963).

The Dean-Bowman merger will also result in a substantial increase in over-all concentration in the packaged milk business in the Chicago Area. The 42% of the market now parceled out among the four leading firms will be shared by only three after the merger. As the Supreme Court pointed out in *Brown Shoe Co.* v. *United States*, 370 U.S. 394, 315 (1962), "the dominant theme pervading congressional consideration of the 1950 amendments [to Section 7 of the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy."

[fol. 6] It is clear that these facts establish a *prima facie* violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On the basis of these facts, the Commission determined that it "had reason to believe" that such violations had been committed, and that "a proceeding in respect thereof would be to the interest of the public"; accordingly, it issued its complaint. See Exhibit A, p. 1. In the circumstances, it is probable that the Federal Trade Commission will enter an order finding a violation of these laws.

IV. Need for Preliminary Injunction

8. Counsel for Dean have informed counsel for petitioner that the present closing date for the acquisition of Bowman's assets by Dean is January 10, 1966. The acquisition agreement provides that on the closing date, Bowman will deliver to Dean bills of sale, certificates of title, and other

documents of conveyance, and instruments of assignment and transfer with respect to all assets purchased under the agreement, together with all books of accounts, and other papers and documents of Bowman. The agreement also provides that on the closing date Dean will deliver its certified check to Bowman in part payment for the purchased assets, together with instruments evidencing Dean's assumption of Bowman's liabilities.

[fol. 7] 9. The attached affidavit of Harry Bender, Chief of the Commission's Division of Economic Evidence, Exhibit D, leaves little doubt that the need for preliminary relief in this case is compelling. Restoration of Bowman as a viable independent will be "extremely difficult and very probably impossible" if the acquisition is allowed to be completed on January 10, 1966. The acquisition itself will split Bowman in two—Dean will acquire fixed assets, receivables and good will; Bowman will retain all cash, government and other marketable securities, and some real estate investments. As soon after the acquisition as is practicable, Dean will dispose of certain Bowman plants and equipment and will consolidate the operations of the companies in Chicago and other markets. Bowman as an entity will no longer exist.

10. The Federal Trade Commission is without jurisdiction to prevent the destruction of Bowman as a viable independent entity. Subsequent prosecution of the merger under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act can hardly be expected to terminate with any order effectively satisfying the needs of the public interest. This Court will, in effect, be deprived of its appellate jurisdiction and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis*—Bowman—will have vanished.

[fol. 8] Wherefore, petitioner prays that the Court issue a preliminary injunction enjoining the respondents from carrying out their agreement until entry of a final order in respect to the Commission's pending administrative proceeding; that the Court issue a temporary restraining order enjoining the respondents from carrying out their agreement until the Court has ruled upon this petition

for preliminary injunction; and that petitioner have such other and further relief as the nature of the case may require and the Court may deem just and proper.

Respectfully submitted, /s/ James McI. Henderson, General Counsel. /s/ James B. Truly, Assistant General Counsel for Appeals. /s/ Federick H. Mayer, /s/ Richard H. Stern, /s/ Peter K. Bleakley, /s/ Mark W. Haase, /s/ Robert M. Johnson, Attorneys, Federal Trade Commission, Washington, D. C. 20580.

[fol. 9] Certificate of Service (omitted in printing.)

[fol. 10] EXHIBIT A

UNITED STATES OF AMERICA, BEFORE FEDERAL TRADE COMMISSION

Docket No. 8674

In the Matter of

DEAN FOODS COMPANY, a corporation.

BOWMAN DAIRY COMPANY, a corporation.

Complaint

The Federal Trade Commission, having reason to believe that the above-named respondents have violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, and that a proceeding in respect thereof would be to the interest of the public; issues this complaint, stating its charges as follows:

I

Definitions

1. For purpose of this complaint, the following definitions are applicable:

(a) "Packaged milk" consists of bottled milk and other packaged milk and related products, such as whole milk, skim milk, cream, half and half (usually packaged in cardboard cartons), whipped topping with a butter-fat base (usually packaged in aerosol cans), and whole milk in bulk cans for hotels, restaurants or institutions. This definition corresponds to Bureau of Census Standard Industrial Classification (S.I.C.) product code 20262.

(b) "The Chicago Area" consists of Cook, DuPage, Lake, Kane and Will Counties, Illinois, and Lake County, Indiana. This area corresponds to the Chicago Federal Milk Marketing Order Area administered by the Department of Agriculture.

[fol. 11] II

Respondent

2. Respondent, Dean Foods Company (hereafter "Dean"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 3600 River Road, Franklin Park, Illinois.

3. Dean, directly and through various wholly-owned subsidiaries, is a large regional producer of packaged milk, other dairy products and non-dairy food products. The company operates nine dairy products plants, seven other food processing plants, and a number of sales offices. Its products are distributed in parts of Illinois, including the entire Chicago Area; parts of Kentucky, Michigan, Tennessee, and Wisconsin; and substantially the entire States of Arkansas and Indiana. In 1964, Dean had sales of $73 million, total assets of $25 million, and net income of $2.8 million before taxes. Dean is approximately the twelfth largest dairy company in the United States.

4. Dean is a profitable and growing company. Since 1959, Dean's sales have grown at an average rate of 7% per year. Dean's net income after taxes has been consistently high in the past five years, averaging 9.5% to 13.5% of net stockholder investment. The recent rapid growth of Dean has been accomplished principally by acquisitions of other dairy and non-dairy companies. Although Dean's total sales increased by $21.6 million between 1959 and 1964, the sales of the companies acquired by Dean in that period exceeded $23.5 million.

Since 1960, Dean acquired the following dairy products companies:

Acquired Company	Year Acquired	Annual Sales at Time of Acquisition
Sunshine Dairy Co., Lafayette, Ind.	1960	$3,000,000
Forest Hill Dairies, Memphis, Tenn.	1960	6,000,000
Shady Lane Dairy, Alpena, Mich.	1964	300,000
Kalamazoo Creamery, Kalamazoo, Mich.	1964	1,200,000
Liberty Dairy, Big Rapids, Mich.	1965	3,000,000

[fol. 12] 5. Dean is and for many years has been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

III

Bowman Dairy Company

6. Respondent, Bowman Dairy Company (hereafter "Bowman"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 140 W. Ontario Street, Chicago, Illinois.

7. Bowman, directly and through various subsidiaries, is a large regional producer of packaged milk and other dairy products. The company operates eight packaged milk plants, three ice cream manufacturing plants, three other dairy products processing plants, and a number of distribution facilities and sales offices, including eight distribution branches in the Chicago Area. It distributes its products in parts of Illinois, Wisconsin, Iowa, Michigan, Ohio, Indiana and Kentucky, but the bulk of its packaged milk sales are made in the Chicago Area. In 1964, Bowman had sales of $77.6 million, total assets of $27.2 million, and a net income of $347,000 before taxes. Bowman is approximately the eleventh largest dairy company in the United States.

8. For many years, Bowman has been the largest or second largest seller of packaged milk in the Chicago Area. In 1964, it enjoyed 16% of such sales. Recently, however, Bowman has experienced operating losses and its sales in the Chicago Area have declined, despite the fact that its operations in other areas have consistently yielded profits and have shown steady increases in sales volume. On October 9, 1965, in an attempt to retain its position in the Chicago packaged milk market, Bowman acquired Capitol Dairy Company, a Chicago firm with annual sales of $9 million.

9. Bowman is and for many years has been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

[fol. 13]

IV

Trade and Commerce

A. Generally

10. The packaged milk industry consists of dairies primarily engaged in the processing of fresh whole milk for the manufacture of bulk and packaged milk. The value of the shipments of packaged milk in the United States amounted to $4.1 billion in 1963. Packaged milk represents approximately 83% of the value of shipments of all fluid milk, the remainder being composed of bulk shipments. Packaged milk represents approximately 44% of the value of shipments of all dairy products.

11. Packaged milk is sold by dairies (i) to retail food stores for resale, (ii) to institutions, (iii) direct to homes, and (iv) to jobbers. Sales by dairies to retail stores and institutions represent "wholesale" sales. Sales by dairies directly to homes represent "retail" sales. Sales made by dairies through jobbers subsequently involve primarily retail sales.

12. The dairy industry is composed of a few very large national and regional concerns and a large number of very small ones. Since World War II, large national and regional dairy companies have acquired hundreds of independent dairy companies. Significant technological changes in the dairy industry have tightened the competitive pressure on the smaller producers, made efficient operation an increasingly expensive proposition in the dairy industry and have caused a high mortality rate among small dairies. For the foregoing reasons, between 1958 and 1963, the number of packaged milk processing establishments in the United States decreased from 5,816 to 4,624, or at an average rate of decrease compounded annually, of over 4%, even though packaged milk sales rose during this period at an average rate, compounded annually, of approximately 1%.

13. Concentration at the national level in the production and sale of packaged milk and other dairy products has reached formidable levels. In 1958, the eight largest companies had 31% of the value of shipments of packaged milk in the United States. Acquisitions subsequent to 1958 and

continuing declines in the number of independent dairies indicate that the level of concentration is rising.

[fol. 14] 14. Increasing barriers to entry in the packaged milk industry, increasing levels of concentration (resulting largely from acquisitions by large national and regional dairy companies), and the consequent decline in the total number of dairy companies, have increased the importance of preserving significant regional competitors like Bowman, which are the firms best able to offer competition to the large national companies.

15. The absorption and elimination of significant regional dairies by acquisition and merger has an adverse competitive effect beyond the direct elimination of actual or potential competition between the acquired and acquiring firms—particularly where the acquiring company is strong in a number of other markets. The Commission's experience with the dairy industry, and other industries, requires it to take notice that a firm strongly entrenched in a number of markets may thereby be able to engage in deep, sustained and discriminatory price cutting in selected markets to the detriment of weaker competitors. In the hands of a powerful firm, able to sustain selective price cuts for so long as may be necessary to insure against a loss of trade, the Commission has found such price cutting to be a potent weapon for repulsing new competition and preventing expansion of smaller rivals.

B. The Chicago Area

16. The Chicago Area is one of the largest markets in the United States for the consumption of packaged milk. The Chicago Area is also the largest consumer market in the United States which is regulated under a Federal Milk Marketing Order.

17. The four largest dairy companies in the Chicago Area account for some 43% of the sales of packaged milk. The remaining dairy companies in the Chicago Area are vastly inferior in size to the Big Four and enjoy individual market shares which are much smaller.

18. In 1964, Bowman was the largest or second largest distributor of packaged milk in the Chicago Area, with 16% of all sales. Bowman's acquisition of Capitol Dairy Company in October of 1965 further increased its already formidable market position in the Chicago Area.

[fol. 15] 19. In 1964, Dean was the third or fourth largest distributor of packaged milk in the Chicago Area, with approximately 7.2% of all sales. Dean's share of packaged milk sales in the Chicago Area has risen substantially since 1960, when its share was only 5.8%.

20. Wholesale packaged milk sales, especially sales to supermarkets, are highly sought after by dairy companies in the Chicago Area. Because such business is highly profitable, supermarket chains are regarded as choice outlets, particularly because of the practice of handling such accounts on an exclusive, or full requirements, basis. On the other hand, retail home-delivery sales, because of increasing delivery costs and a decreasing number of customers per route, are regarded by dairy companies as the less desirable segment of the packaged milk market in the Chicago Area.

21. In 1963, four large grocery chains controlled 52% of grocery store sales in the Chicago Standard Metropolitan Statistical Area (Cook, DuPage, Kane, Lake, McHenry and Will Counties, Illinois), and a like percentage of packaged fluid milk sales made by grocery stores in the Chicago Area. These four grocery chains control a significantly larger share of supermarket sales and of packaged fluid milk sales by supermarkets in the Chicago Area. Each of the four largest companies in the Chicago Area is the exclusive supplier of packaged milk to one of the four largest grocery chains in the Chicago Area. Smaller dairy companies thereby are effectively excluded from supplying the majority of the supermarket, or choice outlets, business in the Chicago Area.

22. Dean supplies the largest grocery chain in the Chicago Area, as well as other grocery store and other wholesale accounts in the Chicago Area. Bowman supplies the third or fourth largest grocery chain in the Chicago Area, as well as other grocery store and other wholesale accounts in the Chicago Area.

V

Violations Charged

23. On December 13, 1965, Dean and Bowman entered into an agreement. This agreement provides that Bowman sell to Dean all of its plants and equipment; accounts re-

ceivable; inventories; leases and leasehold interests; the name "Bowman" and other trademarks and trade names; [fol. 16] "the benefit of all relationships with customers and suppliers"; all customer and supplier lists; and various other tangible and intangible assets. The physical transfer of these assets from Bowman to Dean is scheduled to take place on January 3, 1966.

24. The effect of Dean's acquisition of Bowman may be to lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, and the contract and combination by which Dean and Bowman undertook to eliminate the independent competition of Bowman is in unreasonable restraint of trade and commerce, and may hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, in that:

(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;

(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States, described in Paragraph 13, thereby tending to bring about the adverse competitive effects described in Paragraph 15;

[fol. 17] (f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk.

Wherefore, The Premises Considered, the Federal Trade Commission on this 22nd day of December, A.D., 1965, issues its complaint against said respondent.

[fol. 18] Notice

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of February A.D. 1966, at 10 o'clock is hereby fixed as the time and Federal Trade Commission offices, 1101 Building 11th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint, or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission

under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

[fol. 19] In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 22nd day of December — , A.D., 1965.

By the Commission.

[Seal.]

Joseph W. Shea, Secretary.

[fol. 20] EXHIBIT B

12/9/65

Purchase Agreement

This Purchase Agreement made on the 13th day of December, 1965, by and between Bowman Dairy Company, an Illinois corporation (hereinafter referred to as "Seller") and Dean Foods Company, an Illinois corporation (hereinafter referred to as "Buyer"), in consideration of the mutual promises herein contained and for other good and valuable considerations:

Witnesseth:

1. Seller agrees to sell and Buyer, in reliance on Seller's covenants, representations and warranties, agrees to buy on the Closing Date (as hereinafter defined) all of Seller's right, title and interest in and to the following assets (the "Assets"):

A. All accounts receivable.

B. All inventories.

C. All prepaid expenses.

D. All property, plant and equipment.

E. All non-current receivables.

F. All miscellaneous investments other than those excluded by subparagraph P iv of this paragraph 1.

G. All repair parts, supplies, etc.

H. All leases, leasehold interests and leasehold improvements.

I. The name, "Bowman", and all other trade-marks, trade names, patents and patent rights, copyrights and all other material and supplies used in connection with Seller's business and with the promotion and advertising of its products.

[fol. 21] J. The benefit of all relationships with suppliers and customers.

K. All purchase orders and sales orders.

L. All customer lists, supplier lists and catalogs.

M. All insurance policies (other than life insurance policies).

N. All other contracts.

O. All printed forms, office supplies, and other supplies and small tools.

P. All other tangible and intangible assets, rights, choses in action and all other things of value of Seller except that the following are expressly excluded from this sale:

i. Seller's cash on deposit and on hand;
ii. Seller's U. S. Government Securities;
iii. Seller's marketable securities;
iv. Seller's miscellaneous investments in

a. Stock in Lake Shore Realty Co., Milk Dealer Bottle Exchange, and Dairy House, having respective book values to Seller on June 30, 1965 of $5,400, $17,240 and $500;

b. Certificate of deposit with National Bank of North Evanston of $10,000; Savings accounts at Lincoln Way Savings and Loan Association of Lennox, Illinois ($10,000) and at Illinois Federal Savings and Loan Association of Chicago ($5,000).

[fol. 22] c. Installment sales contract with LaSalle National Bank of Chicago, as trustee, having a net book value to Seller on June 30, 1965 of $209,933.72;

v. Seller's claims for refund of income taxes paid or to be paid.

vi. Seller's life insurance policies on the lives of its present and retired administrative personnel, (including the cash surrender values of such policies) having a book value to Seller on December 31, 1964 of $912,943.

2. Except as adjusted as provided in paragraph 14 below, the agreed consideration to be received by seller from Buyer for the Assets shall be Twelve Million Dollars ($12,000,000) less the book value on the Audit Date of the Assets excluded by paragraph 1 P i-vi above, less any dividends or other distributions made or provided for with respect to the stock of Seller during the period July 1, 1965 through the Closing Date, and plus the book value (computed as set forth in paragraph 3) on the Audit Date of the Liabilities to be excluded pursuant to subparagraphs A, D, and F of paragraph 3 below. The agreed consideration shall be paid

by Buyer's certified (or bank) checks payable to Seller delivered as follows:

A. On the Closing Date, Four Million Dollars ($4,000,000).

B. On the Payment Date defined in paragraph 13 below, all but One Million Dollars (1$,000,000) of the balance of the agreed consideration for the Assets (as adjusted pursuant to paragraph 14).

C. On December 31, 1966, One Million Dollars ($1,000,000), plus interest thereon from the Payment Date defined in paragraph 13 below to December 31, 1966, computed at the rate of four and one-half per cent (4½%) per annum.

[fol. 23] In addition to the agreed consideration, Buyer on the Closing Date shall assume the liabilities (the "Liabilities") of Seller entered on its respective books and records, as of the Audit Date (as hereinafter defined), or incurred pursuant to contracts, purchase orders, sales orders or leases assigned to Buyer and either listed on Exhibit G or excepted by paragraph 6 K below from being listed on Exhibit G, except:

A. Those liabilities owed for any federal or state taxes on income, which for purposes of computing the agreed consideration shall be valued as provided on Exhibit N.

B. Those liabilities which, if when asserted against Buyer, would then be barred by the applicable statute of limitations if then asserted against Seller.

C. Those liabilities which are covered by insurance (other than life insurance) carried by Seller.

D. Those liabilities incident to workman's compensation claims by or on behalf of Seller's employees, which for purposes of computing the agreed consideration shall be valued as provided on Exhibit N.

E. Those liabilities incident to Seller's 1953 pension plan for salaried employees.

F. Those liabilities incident to retirement agreements with certain present and retired administrative personnel listed on Exhibit G, which for purposes of computing the agreed consideration shall be stated at $720,000.

4. Except as specifically provided in paragraph 3, it is expressly agreed that Buyer does not assume any other liability of Seller, and Seller covenants and agrees to assume and be responsible for any other liabilities that it may have incurred.

[fol. 24] 5. Two o'clock P. M., local time, on January 3, 1966, shall be the Closing Date referred to herein, such time to be of the essence hereof. The closing shall take place at the offices of Kirkland, Ellis, Hodson, Chaffetz & Masters, 2900 Prudential Plaza, Chicago, Illinois, or such other place as the parties may mutually select.

6. As material inducements to Buyer's entering into this Purchase Agreement, Seller makes the following representations, warranties and covenants, all of which shall, unless otherwise expressly stated, survive the Closing Date and any investigation made by or on behalf of Buyer at any time prior to December 31, 1966:

A. Seller:

i. is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois;

ii. has the power and authority to own and operate its properties as presently owned and operated and to conduct its business as presently conducted;

iii. is qualified and in good standing as a foreign corporation in the States of Wisconsin and Indiana;

iv. transacts no business in any jurisdiction other than those listed in subparagraphs i and ii above which requires Seller to be qualified as a foreign corporation;

v. has the following subsidiaries which are incorporated in and qualified as foreign corporations as set forth below:

[fol. 25]

Corporate Name	State in which incorporated	What other States qualified in
Badger Ice Cream Company (inactive)	Wisconsin	Illinois and Indiana
Bowman Dairy Company, Inc.	Indiana	Kentucky
Bowman Dairy Company	Ohio	none
Bowman Dairy Sales Company	Delaware	Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mary-

Corporate Name	State in which incorporated	What other States qualified in
		land, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin
The Carroll Company (inactive)	Illinois	none
The Cremix Company	Illinois	none
Cremix Frozen Products, Inc. (inactive)	Ohio	none
Deerfield Creamery Company	Wisconsin	none
Forest Milk Company	Illinois	Wisconsin
Frosty Products Distributors, Inc. (inactive)	Illinois	none
Frosty Products Distributors, Inc. (inactive)	Wisconsin	none
Iowana Farms Milk Company	Iowa	Illinois
Marwyn Dairy Products Corporation (inactive)	Illinois	Wisconsin
Parade Products, Inc.	Illinois	none
Progressive Dairy Products Company	Wisconsin	none
Ranney's Dairy, Inc.	Wisconsin	none
Ridgeview Farms Dairy, Inc. (inactive)	Illinois	none
H. J. Schults, Inc. (inactive)	Illinois	none

[fol. 26]

Sealrich Dairy Company	Michigan	none
Sunnybrook Farms Milk Company (inactive)	Illinois	none

vi. owns all of the outstanding capital stock of each of such subsidiaries free and clear of all liens and such shares are validly issued, fully paid and non-assessable;

vii. as of the Audit Date, covenants that all of the assets (other than of the type excluded pursuant to paragraph 1 P i-vi above) and liabilities (other than of the type excluded pursuant to paragraph 3 A-F above) of each subsidiary will be transferred to and assumed by Seller.

B. Seller is authorized to issue 200,000 shares, all of which are shares of common stock $50 par value per share, and on the date hereof 164,800 of such shares have been issued of which 11,400 are held in its treasury. All of Seller's issued shares are validly issued, fully paid and non-assessable; there are no commitments, options or other rights for the purchase or other acquisition of any of the Seller's unissued or treasury

shares; and there are no agreements that now or in the future may require Seller to repurchase any of its shares.

C. Seller's audited consolidated balance sheet as of December 31, 1964 and unaudited consolidated balance sheet as of June 30, 1965, attached hereto as Exhibit A and its statement of operations for the six months ended June 30, 1965, attached hereto as Exhibit B:

[fol. 27] i. are in accordance with Seller's books and records;

ii. are correct and complete and present fairly the financial condition and results of operations of the Seller as of the dates and for the period indicated; and

iii. have been prepared in conformity with generally accepted accounting principles applied on a consistent basis throughout the periods involved.

Seller's financial statements after audit will show a consolidated net worth of Seller on the Audit Date of no less than $14,000,000 and that the Assets being purchased hereunder will exceed the Liabilities being assumed by at least $10,000,000 on the Audit Date.

D. Except to the extent reflected in said Exhibit A and except to the extent incurred pursuant to contracts listed on Exhibit G or excepted by paragraph 6 K below from being listed on Exhibit G, Seller had no obligations or liabilities, contingent or otherwise, as of June 30, 1965, or any other liability arising out of activities engaged in, or facts existing prior thereto.

E. Except as stated in Exhibit C, since June 30, 1965, no change has occurred in the assets, liabilities (contingent or otherwise), business (other than in the ordinary course of good business practice), employee relations or operations of Seller other than changes in aggregate not materially adverse, and since such date [fol. 28] Seller has not, nor will it, without Buyer's prior written approval from the date hereof to the Closing Date have:

i. declared or paid any dividend or other distribution in respect of its capital stock or acquired any of its stock in excess of $500,000 in the aggregate;

ii. authorized or paid any bonus or increased the

compensation of any officer or employee of the Seller;

iii. authorized or made any contribution to Seller's 1953 pension plan for salaried employees;

iv. waived any rights of substantial value;

v. made any capital expenditure or any commitments therefor in excess of $550,000 in the aggregate;

vi. entered into any employment contract or agreement which is not terminable upon thirty days notice by it;

vii. made any change in its Articles of Incorporation or its issued stock or merged with, consolidated with or acquired any other business entities (other than required by paragraph 6 A vii);

viii. pledged or otherwise have encumbered any of its assets or properties;

[fol. 29] ix. entered into any transaction other than in the ordinary course of business.

F. The Accounts Receivable and Notes Receivable of Seller shown on Exhibit A (or thereafter acquired before the Audit Date) are valid and subsisting accounts or notes of Seller, correct as to amount and legally enforceable according to their terms with no right of set off against them. Nothing herein contained shall be construed as a guarantee of collectibility of any such accounts receivable.

G. The inventories of Seller shown on Exhibit A (or thereafter acquired prior to the Audit Date) consist of items of a quality and quantity usable or salable in the normal course of business of Seller, and the values at which the inventories are carried reflect Seller's normal inventory valuation policy of stating the inventory at cost or market, whichever is lower.

H. Attached hereto as Exhibit D is a list and brief description of all parcels of real property owned by Seller or any subsidiary. Seller or one of its subsidiaries as specified in Exhibit D has good and marketable title in fee simple to each said parcel, and owns outright all the assets and property, real and personal to be transferred to Buyer as provided herein. Each said parcel is:

i. free and clear of all liens, charges and encumbrances (including, without limitations, mortgages,

[fol. 30] mechanics' liens, and liens for Federal, State, County, Town or School Taxes or Assessments not delinquent) except liens, if any, of current local taxes or assessments not delinquent, or being contested in good faith in appropriate proceedings and for which the Seller has established adequate reserves for the payment thereof; and

ii. insurable (as evidenced by a preliminary title report of a title company acceptable to Buyer dated not earlier than 30 days prior to the Closing Date) by a policy of title insurance in an amount at least equal to Seller's December 31, 1964 book value of the land (excluding building) contained in such parcel, containing no more than the following permitted exceptions:

a. standard exceptions and

b. exceptions for minor imperfections in title that are not substantial and do not materially detract from the value of the property or materially impair the use thereof or interfere with the customary operations of the business in which said property is used.

I. Except as provided in Exhibit E, all personal property to be transferred to Buyer as provided herein is free and clear of all security interests and other encumbrances. There are no pending violations with respect to the plants, structures, machinery and equipment and all other items to be transferred to Buyer as provided herein, and subject only to ordinary wear and tear all [fol. 31] plants and other buildings will be in the same condition on the Closing Date as on the date hereof. Except as provided in Exhibit E, all of the personal property to be transferred to Buyer as provided herein will be located on the Closing Date in or on the real estate described in Exhibit D and all personal property located in or on the real estate described in Exhibit D on the Closing Date will be the property of Seller.

J. Attached hereto as Exhibit F is a list and brief description of all domestic and foreign patents, patent applications, patent rights, inventions or discoveries as to which no application for patent has been filed, trademarks and trade names, as well as registrations therefor,

and copyrights presently owned by Seller which (together with the agreements listed in Exhibit G) are sufficient to permit Seller to conduct its business as now operated; all of said items are owned solely by Seller as specified in Exhibit F, are valid and in good standing, and are not subject to any outstanding licenses, liens or other encumbrances; and none of the Seller's shareholders, directors, officers or employees has any interest in any of the aforementioned kinds of items except as disclosed in Exhibit F.

K. Attached hereto as Exhibit G is a list and brief description of all written or oral leases and other agreements (including licenses pertaining to patents, trademarks and tradenames, copyrights, formulae and recipes) to which the Seller is a party, except that Exhibit G need not list agreements made in the ordinary course of [fol. 32] Seller's business that either involve less than $5,000 or may be terminated by either party on not more than 30 days notice. All such leases and agreements either are freely assignable by Seller or Seller will obtain the necessary consents to transfer the same to Buyer on the Closing Date. Seller has complied with all the provisions of said leases and agreements and is not in default under any of them, except as stated in Exhibit G. None of said leases and agreements, and no provision of Seller's Articles of Incorporation or By-Laws, materially and adversely affects the business or financial condition of Seller. True and complete copies of all of said leases and agreements have been delivered to Buyer and there have been no modifications or amendments in any of them.

L. Attached hereto as Exhibit H is a list of all policies of fire, liability, life and other forms of insurance carried by Seller and the nature and amount of coverage in each case. All such policies are in force now and will be in force on the Closing Date. All expiring policies have been or will be renewed for periods expiring on June 30, 1966, unless Buyer otherwise consents in writing.

M. Attached hereto as Exhibit I is a list showing the names of all persons receiving compensation from Seller as of the date hereof in excess of $10,000 per annum and the amounts of their compensation, except such persons

as may be paid pursuant to a collective bargaining agreement listed on Exhibit K.

[fol. 33] N. Attached hereto as Exhibit J is a brief description of all profit sharing, stock option, stock purchase, bonus, pension, retirement, group insurance and other employee welfare plans, written or oral, relating to employees of Seller. Except as stated on Exhibit G Seller is not now and on the Closing Date will not be a party to any employment contract with any officer, director, employee or agent.

O. Exhibit K attached hereto lists all of the unions that now are certified or claiming to be certified as collective bargaining agent to represent employees of Seller and also lists and describes all of the Seller's labor disputes and grievances proceedings before the National Labor Relations Board or any other governmental agency or commission which are now pending.

P. On the Closing Date Seller will be in compliance with all requirements of law except the Bulk Transfer Provisions of the Illinois Commercial Code and the comparable provisions of the laws of other states.

Q. There is no litigation, proceeding, investigation or claim pending or threatened against, by or affecting Seller which could materially affect its business or financial condition, except as listed in Exhibit L. The Seller is not a party to any order, decree or ruling of any court or administrative agency, federal, state or local, and has not had any contacts, formal or informal, with any such [fol. 34] agency that could materially affect its business or financial condition, except as listed in Exhibit L. There is no pending or threatened dispute between Seller and any of its employees that could materially and adversely affect its organization or operations. Seller has complied in all material respects with applicable laws, regulations and orders applicable to its business. There is not now any notice of any kind from any governmental authority or insurance or inspection body relating to or requiring any work to be done by Seller or prohibiting it from carrying on its business as now conducted.

R. The execution and performance of this Purchase Agreement by Seller has been duly authorized by its Board of Directors subject to approval of its Shareholders, and will not violate its Articles of Incorporation,

By-Laws, or any agreement to which it is a party. Simultaneously with the exception of this Purchase Agreement the holders of at least two-thirds of Seller's outstanding stock have executed and delivered to Buyer their irrevocable proxies (in the form attached hereto as Exhibit M) to vote in favor of the consummation of this transaction at a special meeting of the Shareholders of Seller to be held on or before the Closing Date. On or before December 22, 1965, Seller shall give notice of a special Shareholders' Meeting as required by law unless prior to that date Buyer has exercised its privilege of cancelling this Purchase Agreement pursuant to paragraph 8 below. On or prior to the Closing Date, Seller by appropriate [fol. 35] corporate action, duly taken, will have authorized a change of its corporate name to "Bowfund Corporation" and will execute consents evidencing Buyer's unrestricted right to use the corporate name "Bowman Dairy Company".

S. The federal income tax returns of Seller have been examined by the Internal Revenue Service for all years through December 31, 1963, and have been closed through that year. The results of such examinations are properly reflected in the financial statements referred to above.

T. Seller has filed all reports and returns required by any law or regulation to be filed, and has duly paid all taxes, duties and charges due on the basis of such returns and reports, and the assessment of any material amount of additional taxes in excess of those paid and reported is not reasonably expected. Seller now has all required licenses, permits, certificates, and authorizations needed for the conduct of the Seller's business in all states and jurisdictions where the Seller engages in business and all said licenses, permits, certificates and authorizations are fully paid or provided for and in good standing.

U. The books of account of the Seller adequately reflect all items of income and expense, and all assets, liabilities and accruals.

V. No agent or broker or other person acting pursuant to the authority of Seller or any of its directors or officers is entitled to any commission or finder's fee in connection with the transactions contemplated by this [fol. 36] Purchase Agreement.

W. The representations and warranties of Seller con-

tained in this Purchase Agreement shall be true in all material respects on and as of the Closing Date to the same extent as though they were made on and as of that date, except as affected by transactions contemplated herein.

7. After the date hereof and until the Closing Date, representatives of Buyer and persons designated by Buyer shall have reasonable access to the offices, plants, warehouses, books of account, records, minute books, instruments, documents, correspondence, evidence of title and other assets and properties of Seller, and the officers and employees of Seller shall be required to confer with such representatives and persons as reasonably requested by Buyer from time to time. Should the closing under this Purchase Agreement not be held for any reason, Buyer agrees not to use or disclose to third parties without Seller's consent any information acquired by Buyer in the exercise of its rights under this paragraph.

8. Notwithstanding the other provisions of this Purchase Agreement, on or before the Closing Date, Buyer shall have the right to cancel this Purchase Agreement without penalty if on or before that date a complaint seeking an injunction, preliminary injunction or temporary restraining order has been filed (and which has not been dismissed prior to the Closing Date) by any governmental agency, commission, or department on the basis that the consummation of the transactions contemplated by this Purchase Agreement violates any state or federal law. If Buyer cancels this Purchase Agreement pursuant to the provisions of this paragraph 8, Buyer shall return to Seller any and all irrevocable proxies delivered pursuant to paragraph 6 R and neither party shall have any obligation to close the transactions contemplated hereby.

[fol. 37] 9. The following shall be conditions precedent to Buyer's obligation to close hereunder:

A. Each of the representations and warranties set out in this Purchase Agreement shall be true and correct at all times hereafter to and including the Closing Date.

B. Each of the covenants and undertakings of Seller contained in this Purchase Agreement will have been

fully performed and complied with on or before the Closing Date.

C. At a meeting of the Shareholders of Seller held on or prior to the Closing Date the consummation of transactions contemplated by this Purchase Agreement shall have been duly authorized.

D. There shall have been delivered to Buyer on or before the Closing Date all documents required to be delivered by paragraph 10.

Buyer in writing may waive compliance with any or all of the aforementioned conditions precedent to its duty to close hereunder.

10. On the Closing Date Seller shall deliver to Buyer:

A. Bills of sale, certificates of title, and other documents of conveyance and instruments of assignment and transfer in form and substance reasonably satisfactory to counsel for Buyer with respect to all of the Assets being purchased hereunder together with all necessary consents to the conveyances, transfers, and assignments of such Assets and to the assumption of the Liabilities assumed hereunder.

B. All books of accounts, records, correspondence, and other papers and documents of Seller as Buyer may [fol. 38] reasonably require by reason of the acquisition of the Assets sold hereunder, provided that Seller shall have reasonable access thereto for the purpose of inspection and copying and making such other use thereof as Seller may reasonably require in such manner as not to interfere with the reasonable business needs of Buyer.

C. All permits, licenses, certificates and other authorizations required by any public authority which Seller now has and which are legally transferable.

D. Certified copies of resolutions approving and authorizing the execution and performance of this Purchase Agreement by Seller, duly adopted by the Board of Directors and Shareholders of Seller in form and substance satisfactory to counsel for Buyer.

E. Duplicate executed copies of an Amendment to the Articles of Incorporation of Seller changing its corporate name in accordance with this Purchase Agreement, and executed consents evidencing Buyer's unrestricted

right to use the corporate name "Bowman Dairy Company".

F. The favorable opinion of Messrs. Rothschild, Hart, Stevens & Barry, counsel for Seller, in form and substance satisfactory to counsel for Buyer and dated the Closing Date to the effect that:

i. this Purchase Agreement has been duly and validly authorized, executed and delivered by Seller and is valid and binding upon Seller and is enforceable in accordance with its terms;

[fol. 39] ii. the execution and delivery of the documents referred to in paragraph 10 A above for the consummation of this Purchase Agreement have been duly authorized by Seller, have been executed and delivered on behalf of Seller by a duly authorized officer or officers, and are sufficient to vest in Buyer all of the Assets to be purchased hereunder;

iii. the execution and performance of this Purchase Agreement does not conflict with any of the provisions of Seller's Articles of Incorporation or By-Laws or to the best of such counsel's knowledge any agreement, instrument, or court order which is binding upon Seller or to which it is subject;

iv. except as stated in Exhibit L, to the best of such counsel's knowledge and belief, after reasonable inquiry, there is no pending or threatened litigation, proceeding or investigation against Seller which could result in any materially adverse change in the properties, its business or financial condition or prospects or which questions the validity or propriety of this Purchase Agreement or any action or to be taken pursuant hereto;

v. to the best of such counsel's knowledge and belief Seller has performed and complied with all agreements and conditions required hereunder to be performed or complied with by it on or prior to the Closing Date.

[fol. 40] G. The certificate of the President of Seller dated the Closing Date, that the representations and warranties of Seller contained in this Purchase Agreement are true in all material respects on and as of the Closing Date to the same extent as though they were

made on and as of the Closing Date, except as affected by transactions contemplated herein.

H. Such other or additional instruments, consents, opinions, endorsements and documents as counsel for Buyer may reasonably consider necessary to consummate the transactions contemplated by this Purchase Agreement.

I. Executed escrow agreement in the form attached hereto as Exhibit O.

11. On the Closing Date if all of the conditions specified in paragraph 9 above are either performed by Seller or waived by Buyer, Buyer shall pay to Seller the amount specified in paragraph 2 A, shall execute the Escrow Agreement (Exhibit O) and shall deliver to Seller:

A. Instruments in form and substance reasonably satisfactory to counsel for Seller evidencing Buyer's assumption of the Liabilities to be assumed hereunder.

B. Certified copies of the resolutions of Buyer's Board of Directors authorizing the execution and delivery of this Purchase Agreement and the consummation of the transactions contemplated hereby.

C. The favorable opinion of Kirkland, Ellis, Hodson, Chaffetz & Masters, counsel for Buyer, in form and substance satisfactory to counsel for Seller and dated the Closing Date to the effect that:

i. this Purchase Agreement has been duly and validly authorized, executed and delivered by Buyer, is valid and binding upon Buyer and is enforceable in accordance with its terms;

ii. the execution and delivery of the instruments evidencing the assumption of the Liabilities to be assumed hereunder have been duly authorized by Buyer, have been executed and delivered on behalf of Buyer by a duly authorized officer and are sufficient to bind Buyer to pay the Liabilities assumed.

12. As soon as practicable after the Closing Date an audit of Seller's financial statements as of the close of business December 31, 1965 (the "Audit Date"), shall be made by Arthur Andersen & Co. Such audit shall be made in ac-

cordance with generally accepted auditing standards and shall be at the expense of Seller. Upon completion of such audit, Seller shall deliver to Buyer a copy of the audited consolidated financial statements of Seller together with the opinion thereon of Arthur Andersen & Co. (the "Audit Report"), which financial statements shall be prepared in accordance with generally accepted accounting principles. The Audit Report shall also contain exhibits which reflect the following:

A. A consolidated balance sheet of Seller on the Audit Date prepared in accordance with Exhibit N attached hereto, (the "Adjusted Balance Sheet").

D. The amount of Seller's net worth shown on the Adjusted Balance Sheet before any payment or provision for dividends or other distributions with respect to the stock of Seller from July 1, 1965 through the Audit date.

C. The computation of the agreed consideration for the Assets purchased hereunder as adjusted pursuant to paragraph 14.

[fol. 42] 13. The Audit Report referred to in paragraph 12 shall be binding and conclusive upon the parties hereto in determining the amounts referred to in paragraph 12 A, B, and C unless within ten business days after receipt by Buyer of the Audit Report, Buyer notifies Seller that Buyer is in disagreement with the Audit Report, in which event Buyer and Seller each within three business days thereafter shall appoint an arbitrator and said arbitrators within five business days thereafter shall appoint a third arbitrator who shall act as chairman of a board of arbitrators. Within ten days after the appointment of the third arbitrator, the arbitrators (by majority action) shall decide in what respects, if any, the amounts referred to in subparagraphs A, B, and C of paragraph 12 shall be changed from those indicated in the Audit Report, and shall deliver a signed copy of their decision to Buyer and Seller. Said decision of a majority of the arbitrators shall be in writing and shall be binding and conclusive on the parties hereto in determining the amounts referred to in paragraph 12 A, B, and C. Each of the parties hereto shall pay all expenses of the arbitrator selected by such party and the parties hereto each shall pay one half of the expense of the third arbitrator. In the event that Buyer does not indicate disagreement with the Audit

Report, as herein provided, the Payment Date referred to in paragraph 2 C shall be the thirteenth business day after receipt of the Audit Report, as provided herein; and in the event Buyer does indicate disagreement with such Audit Report as provided herein, the Payment Date referred to in paragraph 2 C shall be the third business day after the decision of the majority of the arbitrators is delivered. During the course of the audit referred to in paragraph 12, representatives of Buyer shall have complete access to the books of account and all other records of Seller and the auditing working papers of Arthur Andersen [fol. 43] & Co., prepared in connection with their examination of the financial statements of Seller and its subsidiaries for the years ending December 31, 1964 and 1965.

14. To the extent that the Audit Report (or the decision of the arbitrators as the case may be) indicates that the amount referred to in paragraph 12 B is less than $17,778,468, the agreed consideration for the Assets will be reduced by the amount of that deficit and to the extent that it is so indicated that the amount referred to in paragraph 12 B exceeds $19,058,468, the agreed consideration for the Assets will be increased by the amount of that excess. To the extent that the Audit Report (or the decision of the arbitrators as the case may be) indicates that the amount referred to in paragraph 12 B is between $17,778,468 and $19,058,468 no adjustment to the agreed consideration for the Assets shall be made.

15. Seller agrees to indemnify and hold Buyer, its successors and assigns harmless from and against and in respect of:

A. Any and all loss, damage or liability which Buyer may be required to pay or become liable for arising out of any obligation or liability of Seller not assumed by Buyer hereunder.

B. Any and all loss, damage and deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any warranty, representation, covenant or agreement on the part of Seller contained herein, or in any agreement, assignment, document, statement or certificate furnished or to be furnished to buyer pursuant to or in connection with the transactions contemplated hereby.

[fol. 44] C. Any and all loss, damage or liability to which Buyer or the Assets sold hereunder may be subjected by reason of failure to comply with the Bulk Transfer provisions of the Commercial Code of any state or the provisions of any act requiring notice of the transactions contemplated hereby to any governmental authority or agency.

D. Any and all claims, liabilities, obligations, losses, damages, actions, suits, proceedings, demands, assessments, judgments, reasonable counsel fees, costs and expenses incident to any of the foregoing.

16. After the Closing Date, if any claim be made to, or suit brought against, Buyer for injury, loss, damage, compensation, for any other right, demand or claim whatsoever, for which Seller may be held liable to the claimant, or to Buyer under any indemnity, Buyer shall promptly notify Seller and Seller shall furnish defense. Buyer shall make no settlement or give any consent affecting Seller without Seller's written consent, unless Seller has theretofor failed to accept such defense within five days after Buyer has notified Seller of such claim or suit. Buyer agrees to indemnify and hold Seller, its successors and assigns harmless from and against and in respect of any Liability assumed by Buyer hereunder.

17. If for any reason all of the conditions specified in paragraph 9 shall not be fulfilled or waived by Buyer, Buyer in addition to other remedies available to it at its option, either:

A. May rescind this Purchase Agreement in which event no party shall thereafter have any liability or obligation hereunder; or

[fol. 45] B. Due to the unique character of Seller's Assets to be purchased, by suit may enforce the specific performance of this Purchase Agreement without prejudice to Buyer's rights to damages pursuant to paragraph 14.

18. By notice to Seller delivered on or prior to the Closing Date Buyer may:

A. Adopt the 1953 Pension Plan for Salaried Employees of Bowman Dairy Company (the "Plan"), in

which event Seller shall make such amendments as Buyer shall require in order that Buyer shall thereafter be entitled to exercise all rights and powers reserved to Seller under the Plan, and the trust implementing the Plan; or

B. Require Seller to give notice to the Trustees of the Plan that Buyer during the year 1966 will require the transfer of trust funds held with respect to participants formerly employed by Seller and thereafter employed by Buyer ("Transferred Participants") to the trustee of a separate trust, in which event Seller shall direct the trustees to segregate from the trust fund and transfer to such separate trust such portion of the trust fund as may thereafter be determined by Buyer to constitute the share of the trust fund held in respect of Transferred Participants. The portion of the trust fund subject to transfer shall be an amount equal to the proportion of the trust fund which the actuarial liability of Transferred [fol. 46] Participants bears to the total acturial liability of all participants entitled to benefits under the Plan and in making such determination Buyer shall be entitled to rely on the advice of its actuary or actuaries. During the pendency of the transfer of trust funds no distributions shall be made to any participants on account of a termination of employment except that distributions may be made to participants already retired and to participants who attain their normal retirement age during such period.

Seller agrees not to amend, terminate, make a contribution to, or take any other action with respect to the Plan or the trust prior to the Closing Date without the prior consent of Buyer.

19. After the Closing Date, Seller, as and when requested by Buyer, will execute, acknowledge and deliver any and all additional instruments of transfer and assignment and take such further action as Buyer may reasonably request for the more effective transferring and assignment to Buyer of the Assets purchased hereunder and the consummation of all other transactions contemplated by this Purchase Agreement. After the Closing Date Seller will comply with all reasonable requests of Buyer to cooperate with Buyer in any controversy with third persons with respect to any of the Assets purchased or Liabilities assumed hereunder.

20. Notices, requests, demands, certificates, and other communications hereunder, before or after the Closing Date

shall be in writing and shall be deemed to have been duly received or made if mailed by United States Registered or [fol. 47] or Certified Mail, Postage Prepaid, Return Receipt Requested, addressed:

If to Buyer:	Kenneth J. Douglas 3600 River Road Franklin Park, Illinois
If to Seller:	Thomas J. Kullman 201 N. Wells Street Chicago, Illinois

or, if delivered in person to Kenneth J. Douglas, on behalf of Buyer, and to Thomas J. Kullman, on behalf of Seller, or to such other person or such other address as any party may hereafter designate by written notice to the other.

21. This Purchase Agreement shall be binding upon the parties hereto and their respective successors and assigns and the benefits hereunder shall inure to the same. By notice to Seller delivered at least five days before the Closing Date, Buyer may elect to transfer all or certain of its rights, powers or obligations under this Purchase Agreement to any corporation or corporations controlled by Buyer. In the event of any such transfer, Buyer shall remain liable for the full performance of all obligations of Buyer hereunder.

22. Each party to this Purchase Agreement shall pay all of its own expenses incurred in connection with this Purchase Agreement including any expenses incurred in connection with the negotiation and preparation of this Purchase Agreement and the transactions contemplated hereby.

23. This Purchase Agreement supersedes all prior understandings and represents the entire agreement between the parties hereto and there are no collateral or oral agreements or understandings. All additions, variations or modifications to this Purchase Agreement shall be void and ineffective unless in writing, signed by the parties. All exhibits referred to herein are attached hereto and made a part hereof.

[fol. 48] 24. This Purchase Agreement is being delivered and is intended to be performed in the State of Illinois and shall be governed and construed in all respects in accordance with the laws of such state.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

Bowman Dairy Company, By /s/ T. J. Kullman as its President.

Attest:

/s/Gordon Adamson as its Secretary.

Dean Foods Company, By /s/ Howard M. Dean as its President.

Attest:

/s/ Kenneth J. Douglas as its Secretary.

[fol. 49] EXHIBIT C

AFFIDAVIT OF SCOTT A. WALKER

CITY OF WASHINGTON,
District of Columbia, ss:

My name is Scott A. Walker. I am an economist in the Division of Economic Evidence, Bureau of Economics, Federal Trade Commission. My business address, and that of the Federal Trade Commission, is Washington, D. C. 20580.

I have been an economist or an economic consultant with the Federal Trade Commission since September, 1961. During this time, it has been my job to analyze the probable competitive effects of acquisitions and mergers and to assist in the preparation of economic data for introduction into evidence in merger cases arising under Section 7 of the Clayton Act. I have personally participated extensively in the preparation for trial of various Federal Trade Commission dairy merger cases including *Beatrice Foods Co.*, Docket 6653; *The Borden Company*, Docket 6652; and *National Dairy Products Corp.*, Docket 6651.

Prior to my coming to the Federal Trade Commission, I was closely associated with the dairy industry for almost 25 years. From 1937 to 1939 I worked as a deliveryman and plant relief employee for Sidwell Dairy Company in Iowa City, Iowa. Between 1939 and 1941, I operated a farm in which dairy production was the major source of [fol. 50] income. During 1941 I operated a retail milk route for Sanitary Dairy in Cedar Rapids, Iowa. Between January 1946 and June 1949, I attended Iowa State University, receiving both my bachelor and master degrees in economics. My master's thesis was on the subject of cost allocation in multiproduct dairy processing plants. In June 1948 I accepted a position as organizer and manager of a milk producer's bargaining association in Boone, Iowa, for six months.

In July 1950 I became a cooperative agent with the United States Department of Agriculture and the University of Idaho for the Western Regional Dairy Marketing Committee; in this capacity I supervised several studies of dairy plant economies of scale. From 1953 to September 1961, I was an assistant and associate professor in the Agricultural Economics Department of the University of

Idaho; my chief responsibility was as dairy marketing specialist for the University. As a result of research conducted with the Western Regional Dairy Marketing Committee and the University of Idaho during this time, I was senior author or joint author of five publications and two journal articles relating to the production of milk and the marketing of dairy products.

During July of 1963 I was assigned, by request of the Department of Justice, to serve as a special consultant to [fol. 51] the Antitrust Division of that Department in a Sherman Act, milk price-fixing case against National Dairy Products Corporation before the United States District Court for the Western District of Missouri (Cr. No. 17,734).

I have examined the files of the Federal Trade Commission respecting the acquisition of Bowman Dairy Company by Dean Foods Company and other available information concerning the dairy industry and have reached the conclusion that this acquisition will lessen competition substantially and tend to create a monopoly in the sale and distribution of packaged milk in the Chicago, Illinois, area:

1. Through its acquisition of Bowman, Dean, a major factor in the packaged milk business in the Chicago Federal Milk Marketing Order ("FMMO") Area, will eliminate its largest single competitor. Bowman is either the largest or the second largest seller of packaged milk in the Chicago FMMO Area with approximately 16% of total sales; Dean is either the third or fourth ranking seller with about 7% of total sales. The combined sales of the two companies amount to some 23% of the market.

2. The Bowman acquisition by Dean will result in a significant increase in the level of concentration in the packaged milk business in the Chicago FMMO Area and will accordingly increase the probability of the leading sellers' refraining from vigorous competition. The four [fol. 52] largest sellers of packaged milk in this market presently enjoy about 42% of total sales; as a result of the acquisition the three leading sellers will command about 42% (Dean, The Borden Company and Hawthorne-Mellody). The remaining approximately 58% is divided among dozens of smaller firms. Furthermore, recent events indicate that there exists a distinct trend toward concentration and oligopoly in this market. Within the past few months at least four packaged milk firms have

gone out of business in the Chicago FMMO Area—two by acquisition. Bowman, itself, very recently acquired a Chicago packaged milk distributor which Bowman had been supplying since that firm ceased processing about two years ago. The acquisition of Bowman, eliminating as it does a leading seller of packaged milk in the Chicago FMMO Area, moves the market a significant step closer to a state of oligopoly, and thus will involve substantial lessening of competition and tendency to monopoly.

3. The proper product market or line of commerce in which to evaluate the probable effects of this acquisition is, I believe, packaged milk (fluid milk in bottles or cardboard cartons) and closely related products such as skim milk, cream, etc. This product group is classified by the United States Bureau of Census as Standard Industrial Classification (SIC) Product Code 20262. Both Dean and Bowman are extensively engaged in the processing and sale of packaged milk and related products in the Chicago, Illinois, area.

[fol. 53] 4. I believe that the Chicago FMMO Area is a proper geographic market or section of the country in which to measure the effects of Dean's acquisition of Bowman. This area consists of the Counties of Cook, DuPage, Lake, Kane, and Will in the State of Illinois and the County of Lake in the State of Indiana. The most important characteristic of the Chicago and other FMMO Areas is that the price paid by packaged milk processors to the producer or farmer for fresh whole milk is regulated by the United States Department of Agriculture. Thus regulation has the effect of creating a relatively insulated market for processed packaged milk within the FMMO Area. Dean and Bowman are both engaged extensively in the processing and sale of packaged milk in the Chicago FMMO Area. In fact, the Chicago FMMO Area is Bowman's principal market; more than half of Bowman's total sales are made in the Chicago FMMO Area.

Scott A. Walker.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 28th day of December, '65.

Rita R. Votel, Notary Public, District of Columbia.

My commission expires on November 14, 1969.

[fol. 54] EXHIBIT D

AFFIDAVIT OF HARRY BENDER

CITY OF WASHINGTON,
District of Columbia, ss:

My name is Harry Bender. I am Chief of the Division of Economic Evidence, Bureau of Economics, Federal Trade Commission. My business address is 6th and Pennsylvania Avenue, N.W., Washington, D. C.

Between 1947 and 1961, I was employed as an economist in the Antitrust Division of the Department of Justice, where I had primary responsibility for the economic work in a number of major antitrust cases, several of which were in the merger field involving Section 7 of the Clayton Act. In this work, I gained considerable knowledge and experience in problems of divestiture.

I became Chief of the Division of Economic Evidence of the Bureau of Economics in October 1961. As Chief of this Division, I supervise the work of about sixteen economists, the majority of whom work on merger cases. Problems of divestiture arise in many of these merger cases. I review the staff's work on such divestiture matters, and I also participate personally in numerous negotiations and studies of various divestiture proposals.

I have examined the files of the Federal Trade Commission respecting the acquisition of Bowman Dairy Company [fol. 55] by Dean Foods Company, and I have come to the conclusion that, if the acquisition is consummated as planned, it will be extremely difficult, and very probably impossible to restore Bowman as a viable and effective independent processor and seller of packaged milk:

1. It has been my experience that effective divestiture relief in merger cases is always difficult. It is usually extremely difficult to locate satisfactory purchasers. This is because the most likely prospects for the purchase of a company acquired in violation of Section 7 are often its competitors, suppliers, or customers, and divestiture to such purchasers will often be as objectionable as was the original acquisition. During the course of litigation, the acquiring company frequently makes substantial changes

in the assets and operating methods of the acquired firm which complicate or even prevent effective divestiture. It has been my experience that there are very few litigated Federal Trade Commission merger cases which truly ended in the restoration of the acquired firm as a viable independent competitor in the market.

2. During the past three years, the Federal Trade Commission has entered four antimerger orders against dairy companies—*National Dairy Products Corp.*, Docket 6651; *The Borden Company*, Docket 6652; *Foremost Dairies, Inc.*, Docket 6495, and *Beatrice Foods Co.*, Docket 6653; the first three of these orders have already become final. To date, [fol. 56] the Commission and the respondents involved have engaged in extensive discussion and negotiation concerning divestiture of the acquired properties.

The working out of satisfactory divestiture arrangements has been extremely difficult and the results achieved have been, unfortunately, far short of the remedial action which would fully serve the public interest. For example, in many localities milk processing and distribution operations were consolidated, and acquired plants and routes were subsequently abandoned or otherwise disposed of; trademarks and trade names have been allowed to fall into disuse or even abandoned. The effect of this has been, in many sections of the country, to make it impossible to divest the acquired companies—because they no longer exist and cannot be reconstituted.

3. In the present case, Dean has indicated to the staff of the Federal Trade Commission that, shortly after the acquisition of Bowman, Dean will dispose of Bowman's retail home delivery routes, and that it will consolidate the operations of the two companies and close various Bowman plants. The contract between Dean and Bowman further provides that more than 25% of Bowman's total assets (principally cash and marketable securities), are to be retained by the Bowman stockholders; Dean is to acquire primarily fixed assets, accounts receivable, and good will. In short, approximately half of Bowman's present assets [fol. 57] will be disposed of after the acquisition takes place. When all of these events have taken place, restoration of Bowman as a viable independent company will be

virtually impossible, even though the acquisition be subsequently adjudged unlawful.

Harry Bender.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 28th day of December, 1965.

Anna Lee Strang.

My commission expires on June 14, 1968.

[fol. 58] EXHIBIT E

AFFIDAVIT OF MELBOURNE C. STEELE

City of Washington,
District of Columbia, ss:

My name is Melbourne C. Steele. I am the Chief of the Division of Accounting, Bureau of Restraint of Trade, Federal Trade Commission. My business address, and that of the Federal Trade Commission is Washington, D. C. 20580.

I have been an accountant with the Federal Trade Commission for 36 years. I have held my present position since 1963. In both capacities I have analyzed the financial statements of hundreds of industrial corporations.

I have examined the files of the Federal Trade Commission respecting the acquisition of Bowman Dairy Company by Dean Foods Company, including certain of Bowman's financial statements. These statements included consolidated income statements for the five years ending December 31, 1964, and a consolidated balance sheet as of December 31, 1964. Bowman's balance sheets for the years 1960-1963 were not available. On the basis of my examination of these data, I have concluded that Bowman was, on December 31, 1964, in sound financial condition:

1. Bowman reported a net income before federal income taxes in each of the last five years. In 1961 and 1964 Bow-
[fol. 59] man showed a net operating loss, but these losses were more than offset by other income. The operating loss in 1964, however, was largely offset by a non-recurring profit from the sale of fixed property.

2. While Bowman's net sales have declined from about $86.4 million in 1960 to about $77.6 million in 1964, substantial reductions have been made in the cost of sales and in delivery, selling and administrative expenses which largely offset the decline.

3. The Commission's files indicate that Dean plans to dispose of certain of Bowman's assets and business after the acquisition. While many of the properties Dean plans to sell are profitable, it will also dispose of Bowman's unprofitable retail and mixed routes in Chicago and its unprofitable ice cream plant and business in Cleveland. Dean has prepared a pro forma consolidated statement of income

for 1964, which segregates these unprofitable aspects of Bowman's business and which indicates that Bowman showed a small net operating profit on the remainder of its business.

4. As of December 31, 1964, Bowman showed a very substantial earned surplus amounting to approximately $10.8 million. The amount of earned surplus exceeds the sum of Bowman's capital stock ($8.2 million) and its long term debt ($1.5 million). This indicates that Bowman has largely financed expansion through reinvestment of its earnings.

[fol. 60] 5. Bowman's ratio of current assets to current liabilities (working capital ratio) in 1964 was 2.41 to 1, as compared with Dean's ratio of only 1.75 to 1. This ratio is a good indicator of the financial stability of Bowman.

/s/ Melbourne C. Steele.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 28th day of December, 1965.

Rita R. Votel, Notary Public, District of Columbia.

My commission expires on November 14, 1969.

[fol. 61] EXHIBIT F

AFFADAVIT OF HENRY A. SOLDWEDEL

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, ss:

My name is Henry A. Soldwedel. I am the President and Chief Executive Officer of Sidney Wanzer & Sons, Inc., a dairy company which operates in the Chicago, Illinois, metropolitan area. My business address, and that of my company, is 130 West Garfield Boulevard, Chicago, Illinois 60609.

I have been in the milk business for 40 years. Between 1925 and 1955 my, brother and I owned and operated a dairy company in Pekin, Illinois. From 1956 to 1963, I was associated with The Borden Company in various capacities; from 1959 through 1961, I was Borden's General Manager in the Chicago area. In February 1963, I and three other associates bought Wanzer, and since that time I have been the President and Chief Executive Officer of that company.

My company, Wanzer, has for 75 years been in the business of processing and selling packaged milk and other dairy products at wholesale and at retail in the Chicago, Illinois, metropolitan area. Our business presently is divided into four approximately equal parts: sales to grocery and other stores; retail home delivery sales; sales to institutional accounts; and sales to vendors or distributors, who resell the milk. The annual sales of my company total over $15 million and the company's assets are approximately $2.6 million.

[fol. 62] My company, Wanzer, is a subsidiary of S. W. Milk Corporation, the stock of which is owned by myself and three other persons. For some time, my associates and I have been interested in expanding the operations of our company. To this end, over a period of the past two years we have invested $1.5 million in a milk processing plant. Moreover, my associates recently acquired all the stock of Western-United Dairies, which was then converted from a processor and distributor into a vendor which purchases its milk for resale from Wanzer. We have also been interested in acquiring all or part of the assets of

Bowman Dairy Company, particularly those located in the Chicago, Illinois, metropolitan area. In August of this year, one of my associates made some inquiries through the First National Bank of Chicago about possible purchase of Bowman.

My associates and I continue to be seriously interested in acquiring Bowman as a going concern, and continuing its operations in the Chicago market. We are ready to enter into negotiations with Bowman or its representatives to this end. A $10 million to $15 million figure for the Bowman assets would not deter us, if the value of the assets involved warranted such a figure.

/s/ Henry A. Soldwedel.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 20th day of December, 1965.

Rita B. Votel, Notary Public, District of Columbia.

My commission expires on Nov. 14, 1969.

[fol. 63] EXHIBIT G

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

ORDER ON APPLICATION FOR PRELIMINARY INJUNCTION PENDENTE LITE

The United States Court of Appeals for the Seventh Circuit, having jurisdiction over the parties and over the subject matter; and the Federal Trade Commission, having filed a Complaint against Dean Foods Company and Bowman Dairy Company, charging them with violation of statutes administered by the Federal Trade Commission; and it appearing to the Court that the Federal Trade Commission has shown that it is probable that Dean Foods Company and Bowman Dairy Company will be adjudged by it to have violated such statutes; and it having been shown that entry of a preliminary injunction by the Court in the premises is in the public interest; and the parties [fol. 64] having been duly heard upon due notice in respect to this matter by the Court; the following findings of fact and conclusions of law are made:

Findings of Fact

1. Dean Foods Company (hereafter referred to as "Dean") is a corporation doing business within the State of Illinois, with its principal office at 3600 River Road, Franklin Park, Illinois.

2. Bowman Dairy Company (hereinafter referred to as "Bowman") is a corporation doing business within the State of Illinois, with its principal office at 140 West Ontario Street, Chicago, Illinois.

3. On December 13, 1965, Dean and Bowman entered into an agreement with one another. This agreement provides that Bowman sell to Dean all of its plants and equip-

ment, accounts receivable, inventories, leases and leasehold interests, the name "Bowman" and other trademarks and trade names, "the benefit of all relationships with customers and suppliers," all customer and supplier lists, and various other tangible and intangible assets.

4. On December 20, 1965, petitioner, the Federal Trade Commission, issued its Complaint, charging that the afore- [fol. 65] said agreement and acquisition were in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, statutes administered by the Federal Trade Commission. An administrative proceeding instituted under the applicable statutes, to determine the legality of the aforesaid agreement and acquisition, is now pending before the Commission.

5. The transfer of title, under the aforesaid agreement, is presently scheduled for January 10, 1966. Shortly thereafter, a substantial portion of the business and the assets of Bowman will be materially altered or disposed of, thereby substantially decreasing the possibility of subsequently undoing the transaction and of restoring Bowman, as a viable, independent competitor.

6. On the basis of the affidavits submitted, it appears probable that at trial a *prime facie* violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act will be established, in respect to the aforesaid agreement for Dean's acquisition of Bowman. In this connection, it appears that the proposed acquisition will result in the combination of two major competitive factors [fol. 66] in the sale and distribution of packaged milk (SIC product code 20262) (shown probably to be the relevant product market or "line of commerce") in the Chicago Federal Milk Marketing Order Area (shown probably to constitute a relevant geographic market or "section of the country"); at present, Dean probably enjoys approximately 7% of such sales, Bowman probably enjoys approximately 16% of such sales, and the other two leading sellers in the market probably enjoy approximately another 19% of such sales between them. There has recently been a trend in the Chicago Area toward the elimination of smaller, independent dairy companies, by merger or otherwise.

7. It appears unlikely that, and respondents have not

shown it probable that, this *prima facie* case will be rebutted. Bowman appears to be in sound financial condition; in 1964, it had assets of $27 million, net sales of $77 million, and an earned surplus of over $10 million. It has not been shown that Bowman faces the grave probability of a business failure. It is not the case that the only alternatives presented for Bowman are liquidation (through a receiver or otherwise) or an outright sale. Nor has it been shown that Dean is the only available purchaser of Bowman.

[fol. 67] Conclusions of Law

1. This Court has jurisdiction to review any final order of the Federal Trade Commission entered against Dean or Bowman in respect to the agreement and acquisition referred to in Finding No. 3, at the close of the administrative proceeding in respect thereto referred to in Finding No. 4. Clayton Act, § 11(c), 15 U.S.C. § 21(c); Federal Trade Commission Act, § 5(c), 15 U.S.C. § 45(c). Such review will entail this Court's entry of its own final order in respect to the matter.

2. This Court has the power to issue any writ necessary or appropriate to prevent the impairment of such jurisdiction. 28 U.S.C. § 1651(a); *Board of Governors* v. *Transamerica Corp.*, 184 F.2d 311 (C.A. 9th Cir. 1950), *cert. denied*, 340 U.S. 883 (1950); *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963).

3. There has been a showing of likelihood that the agreement and acquisition involved will ultimately be found by the Federal Trade Commission to be in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). [fol. 68] There has been a showing of likelihood that changes in the business and the assets of Bowman will be made which will substantially decrease the probability of entry of a final order in the premises which will fully serve the public interest and carry out the remedial policy of the aforesaid statutes. In the circumstances, this Court deems it appropriate to issue a preliminary injunction to preserve the status quo *pendente lite*, in aid of its jurisdiction.

Wherefore, It Is Ordered, Adjudged, and Decreed: That respondents, Dean and Bowman, are enjoined from taking any further steps to consummate their Purchase Agreement of December 13, 1965, and from making any changes, directly or indirectly, with respect to the capital stock or corporate structure of Bowman or in the business, operations, and policies of Bowman in any respect other than those changes made in the ordinary course of business pending entry of a final order (as "final order" is defined in 15 U.S.C. §§ 21 and 45) in respect to the proceeding now pending before the Federal Trade Commission.

[fol. 69] EXHIBIT H

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No.

FEDERAL TRADE COMMISSION, Petitioner

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

ORDER IN RESPECT TO APPLICATION FOR TEMPORARY RESTRAINING ORDER

This Court having before it an "Emergency Petition for Preliminary Injunction, Temporary Restraining Order, and Other Relief in Aid of the Jurisdiction of the Court," filed by the Federal Trade Commission against Dean Foods Company (hereafter referred to as "Dean") and Bowman Dairy Company (hereafter referred to as "Bowman"); said petition being accompanied by a Complaint filed against Dean and Bowman by the Federal Trade Commission, instituting an administrative proceeding against them which is now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean, and charging that such agreement and acquisition are in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 [fol. 70] and 45; and it appearing to the Court that there is substantial likelihood that such agreement and acquisition will ultimately be adjudged in violation of such statutes; and it appearing to the Court than Dean and Bowman now threaten the performance of such agreement and the consummation of such acquisition, and that thereupon or shortly thereafter there will take place material alterations in the business or assets of Bowman which, to the irreparable injury of the public, will render difficult or impossible the restoration of the status quo ante; and it appearing to the Court that this threatened action will therefore defeat or impair its jurisdiction in the premises, under Section 11(c) of the Clayton Act and Section 5(c)

of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c) and 45(c), to enter an effective final order in respect to this matter;

Now, Therefore, It Is By the Court, this — day of January, 1966,
Ordered that:

(1) Dean and Bowman are hereby restrained from carrying out the whole or any part of their "Purchase Agreement" dated December 13, 1965;
[fol. 71] (2) Dean is hereby restrained from acquiring any stock or assets of Bowman;
(3) Bowman is hereby restrained from making any changes, directly or indirectly, with respect to its corporate structure or properties, or in its operations or business other than those changes made in the ordinary course of business.

It is Further Ordered that this restraining order shall expire on the "Termination Date," defined as follows:

(1) If this Court issues a preliminary injunction or other protective order in respect to the Dean acquisition of Bowman, the "Termination Date" shall be the effective date of such injunction or order;
(2) If this Court issues no preliminary injunction or other protective order in the premises, the "Termination Date" shall be five (5) days after this Court issues its judgment in the premises, except as provided in the following paragraph;
(3) If, upon the application of the Government, a Justice of the United States Supreme Court issues or denies a stay or like order in the premises, the "Termination Date" shall be the effective date of such order or the denial thereof.

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Circuit Judges ELMER J. SCHNACKENBERG, LATHAM CASTLE and LUTHER M. SWYGERT

No. 15493

[Title omitted]

ORDER IN RESPECT TO APPLICATION FOR TEMPORARY RESTRAINING ORDER—January 4, 1966

This Court having before it an "Emergency Petition for Preliminary Injunction, Temporary Restraining Order, and Other Relief in Aid of the Jurisdiction of the Court," filed by the Federal Trade Commission against Dean Foods Company (hereafter referred to as "Dean") and Bowman Dairy Company (hereafter referred to as "Bowman"); said petition being accompanied by a Complaint filed against Dean and Bowman by the Federal Trade Commission, instituting an administrative proceeding against them which is now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean, and charging that such agreement and acquisition are in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45; [fol. 73] and it appearing to the Court that there is substantial likelihood that such agreement and acquisition will ultimately be adjudged in violation of such statutes; and it appearing to the Court that Dean and Bowman now threaten the performance of such agreement and the consummation of such acquisition, and that thereupon or shortly thereafter there will take place material alterations in the business or assets of Bowman which, to the irreparable injury of the public, will render difficult or impossible the restoration of the status quo ante; and it appearing to the Court that this threatened action will therefore defeat or impair its jurisdiction in the premises, under Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c) and 45(c), to enter an effective final order in respect to this matter;

Now, Therefore, It Is By the Court, this 4th day of January, 1966,
Ordered that:

(1) Dean and Bowman are hereby restrained from carrying out the whole or any part of their "Purchase Agreement" dated December 13, 1965;
[fol. 74] (2) Dean is hereby restrained from acquiring any stock or assets of Bowman;
(3) Bowman is hereby restrained from making any changes, directly or indirectly, with respect to its corporate structure or properties, or in its operations or business other than those changes made in the ordinary course of business.

It Is Further Ordered that this restraining order shall expire on the "Termination Date," defined as follows:

(1) If this Court issues a preliminary injunction or other protective order in respect to the Dean acquisition of Bowman, the "Termination Date" shall be the effective date of such injunction or order;
(2) If this Court issues no preliminary injunction or other protective order in the premises, the "Termination Date" shall be five (5) days after this Court issues its judgment in the premises, except as provided in the following paragraph;
(3) If, upon the application of the Government, a Justice of the United States Supreme Court issues or denies a stay or like order in the premises, the "Termination Date" shall be the effective date of such order or the denial thereof.

[fol. 75] Judge Swygert:

As a member of the panel, I vote not to act on the petition for temporary restraining order until the "emergency petition for preliminary injunction, temporary restraining order, and other relief in aid of the jurisdiction of the court" is heard on January 6, 1966, it being represented in the petition that by agreement of counsel the transfer of Bowman Dairy Company assets to Dean Foods Company, originally scheduled for January 3, 1966, has been deferred to January 10, 1966.

[fol. 76] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

MOTION TO VACATE ORDER IN RESPECT TO APPLICATION FOR TEMPORARY RESTRAINING ORDER—Filed January 5, 1966

Now come the respondents, Dean Foods Company and Bowman Dairy Company, by their attorneys, and respectfully move that at the conclusion of the hearing in this cause on January 6, 1966, this Honorable Court forthwith vacate the "Order In Respect To Application for Temporary Restraining Order" entered upon the *ex parte* motion of the petitioner on January 4, 1966, for the reasons set forth in the attached affidavit of Hammond E. Chaffetz, one of the attorneys for the respondent Dean Foods Company.

Respectfully submitted, Edward I. Rothschild, L. Edward Hart, John Paul Stevens, Attorneys for Respondent, Bowman Dairy Company.

Hammond E. Chaffetz, William R. Jentes, Lawrence Gunnels, Attorneys for Respondent, Dean Foods Company.

[fol. 77] AFFIDAVIT

STATE OF ILLINOIS,
County of Cook, ss:

HAMMOND E. CHAFFETZ, being first duly sworn on oath, deposes and says:

1. That he is counsel of record for the Respondent Dean Foods Company in this cause.

2. That affiant was advised on January 4, 1966, by the Clerk of the Court that the Court had entered an "Order in Respect to Application for Temporary Restraining Order" requested upon *ex parte* application of petitioner, the Federal Trade Commission.

3. That on January 5, 1966, the respondents are filing with the Court (contemporaneously with this Motion to Vacate) their Brief and Supporting Affidavits in Opposition to the Federal Trade Commission's Emergency Petition for Preliminary Injunction; it is believed that the respondents' brief, affidavits and argument will conclusively demonstrate not only that the Commission has no case on the merits of its attack against the merger of the respondents, but also that the Commission has no standing or power as a matter of law to obtain either preliminary injunctive relief or a temporary restraining order in this proceeding.

[fol. 78] 4. That closing of the merger agreement between respondents already has been inordinately delayed and postponed. Any additional delay beyond the latest postponement date of January 10, 1966, will seriously, if not fatally, jeopardize the entire transaction, particularly in light of the widespread publicity generated by the Commission's action herein and the inevitable decline in Bowman's patronage and business relations suffered as a direct result.

Further affiant sayeth not.

Hammond E. Chaffetz.

Subscribed and Sworn to before me this 5th day of January, 1966.

——, ——, Notary Public.

[fol. 79] Proof of Service (omitted in printing.)

[fol. 80] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

APPENDIX TO RESPONDENTS' JOINT BRIEF IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S EMERGENCY PETITION FOR A PRELIMINARY INJUNCTION AND OTHER RELIEF—Filed January 5, 1966

Edward I. Rothschild, L. Edward Hart, John Paul Stevens, Attorneys for Respondent, Bowman Dairy Company.

Hammond E. Chaffetz, William R. Jentes, Lawrence Gunnels, Donald Kempf, Attorneys for Respondent, Dean Foods Company.

January 5, 1966.

INDEX

1. Francis H. Kullman, Jr.	Chairman of the Board, Bowman Dairy Company
2. Sam E. Dean	Chairman of the Board, Dean Foods Company
3. William S. Turner	Senior Vice-President, The Northern Trust Company
4. E. Vance Clark	Senior Trust Officer, Central Trust Company of Cincinnati
5. Johnston A. Bowman	Vice-Chairman of the Board, Bowman Dairy Company
6. Leonard Spacek	Partner and Chairman, Arthur Andersen & Co.
7. Walter Schaub	Chairman of the Board, Scot Lad Foods, Inc.
8. Walter E. Roney	President, Roney Ice Cream Company
9. Fred Nonnamaker	Executive Secretary, Associated Milk Dealers, Inc.
10. A. L. McWilliams	General Manager, Pure Milk Association
11. Anthony C. Karlos	Chairman of the Board, Grocerland Co-Operative, Inc.

[fol. 82] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF FRANCIS H. KULLMAN, JR., IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

FRANCIS H. KULLMAN, JR., being first duly sworn, on oath deposes and says that:

1. He has been employed by the Bowman Dairy Company since 1915 and since 1962 has been Chairman of Bowman's Board of Directors.

2. Due to a variety of factors, most of which are the outgrowth of Bowman's historic commitment to retail home delivery milk sales, the company's operations have witnessed a marked decline in recent years.

3. As the following table shows, during the past five years annual sales of the Bowman Dairy Company have declined by nearly $9,000,000, or over 10 percent:

Net	Sales
1960	86,447,911
1961	82,835,515
1962	80,859,960
1963	77,813,577
1964	77,605,416

4. While Bowman's sales have declined, its profits have disappeared. In 1964 the company suffered an operating loss of $699,488.

5. Despite strenuous efforts by Bowman management in recent years to halt this trend, it was management's conclusion that the company's fortunes would most probably become worse instead of better in future years.

6. One of the principal factors leading to the decline in Bowman's fortunes has been the historical change in the distribution pattern of dairy products.

7. Prior to the 1920's dairy products were distributed by means of home delivery routes, particularly in large urban centers. During that era, Bowman developed the largest home delivery business in Chicago. At its zenith, Bowman had over 2200 retail routes in the Chicago area and was a healthy and profitable dairy company.

8. During the 1920's and 1930's, however, retail stores

began to replace home delivery as the primary means of distributing dairy products.

9. This trend away from home delivery continues today, with the result that this mode of distribution has been drying up. As the following table shows, Bowman's annual home delivery business is down over $5,000,000 in sales from what it was in 1960:

Net Sales, Chicago Retail and Mixed Divisions

1960	25,831,484
1961	24,281,876
1962	24,264,061
1963	21,745,922
1964	19,977,623

[fol. 84] Not only is it a steadily declining portion of the dairy business, but it has been increasingly unprofitable for Bowman. In 1964, Bowman lost $1,571,989 on its Chicago operations due primarily to its home delivery business and a loss of over $900,000 is expected to be reported by Bowman on its Chicago operations for 1965. Bowman's total sales and net operating losses in Chicago for the past five years are set forth in the following table:

	Sales	Net Operating Losses
1960	56,796,962	($ 197,459)
1961	53,089,958	(678,127)
1962	52,628,675	(618,315)
1963	48,993,885	(617,841)
1964	46,596,008	(1,571,989)
Average Annual Loss		($ 736,746)

10. Unfortunately Bowman was extremely late in seeking to adapt itself to this change in the pattern of milk distribution. Instead of seeking to secure a foothold in the expanding wholesale distribution of dairy products to retail stores, Bowman for many years concentrated its efforts on protecting and preserving home delivery distribution. This was due in part to Bowman's heavy investment in the home delivery business, which it felt it must protect. It was also reluctant to enter into costly price-cutting battles with [fol. 85] the other dairies for the growing—but still relatively small—wholesale distribution business. For one thing, any attempt to secure store accounts by submitting a low bid would also have tended to reduce the home delivery price structure where Bowman had the vast bulk of its

sales. These factors explain why Bowman did not get into the wholesale distribution of dairy products on the ground floor.

11. By the time Bowman did make serious efforts to build its wholesale distribution, other dairies were already firmly entrenched with the larger accounts. Bowman has made a number of attempts to secure those accounts through competitive bidding, but has generally been unsuccessful. Present suppliers are frequently given the opportunity to match any bid submitted by Bowman. Only this past year Bowman sought to secure the A & P account in Chicago, but lost out to Borden, even though its bid was cut to the competitive minimum.

12. Bowman's inability to build a substantial wholesale operation in Chicago has handicapped it in a number of ways. The cost of distributing milk on home delivery routes has steadily mounted relative to the cost of distributing milk on wholesale routes. The stores and supermarkets being built today are large volume operations. As a result, dairy companies distributing primarily through wholesale routes are able to use large trucks which dispose of their [fol. 86] entire load in a relatively few stops. Dairies, such as Bowman, with extensive home delivery routes, however, suffer not only from the fact that their deliveries are being made to a large number of housewives with very small individual requirements, but also from the fact that, as more housewives switch from home delivery to store purchasing, the distance between home delivery stops is constantly increasing. In Bowman's case, its routes dropped from a high of 2200 to well below 500, and further consolidation of routes has become almost impossible.

13. Bowman's contract with the Teamsters' Union has been another important factor contributing to the steadily mounting costs of home delivery. No allowance has been made by the union for the fact that the home delivery route man cannot deliver nearly as much milk as the wholesale route man. Almost equal pay has been required, with the result that labor costs on a home delivery route are about five times as much per quart as on a wholesale route. In addition, the union in Chicago has maintained the base pay at about 90 percent of the workers' potential top pay. This has all but eliminated the use of commissions as an incentive to the employee to build his route by soliciting new

customers. Finally, the union requirement that older men remain and younger men be discharged in any consolidation of routes effectively locked Bowman in with its oldest and often times least productive drivers.

14. It is probable that Bowman's home delivery plight is among the worst of any dairy in Chicago.

[fol. 87] 15. Smaller dairies generally get a better break in their dealings with the union. It is easier for them to discharge inefficient drivers and to insure that they have a number of young and aggressive drivers who will make a real effort to maintain their retail routes at a high level. In addition, small dairies generally have lower overhead expenses.

16. The larger dairies having a home delivery business (such as Borden and Hawthorn Mellody) also enjoy advantages over Bowman. These companies distribute a much larger percentage of their milk on wholesale routes. With this large wholesale volume to fill their plants, they have been able to eliminate their less efficient routes completely and preserve only their high volume, relatively low cost retail routes. Bowman, on the other hand, has had a relatively small percentage of its volume in the wholesale business. Any attempt to trim its routes as Borden and Hawthorn Mellody have done would mean running the River Forest plant at less than 50 percent capacity with the result that the cost per unit of milk would rise sharply.

17. Bowman's problems do not lie only in its home delivery business, however. Because of its late entry into wholesale distribution, the store accounts it did secure were predominantly of the "Ma and Pa" variety. As the retail food business has trended toward fewer but larger stores, many of these Bowman outlets went out of business. Even with respect to the few large store accounts that Bowman [fol. 88] has secured, its position is extremely vulnerable. Kroger and High-Low, Bowman's two largest individual accounts, have not matched the growth rate of the other chains in the Chicago area. Moreover, Kroger has already opened its own dairies in Dayton, Indianapolis and Cincinnati, is building a plant in Detroit, and has indicated it may eventually build one in the Chicago area as well.

18. While Bowman has had its largest volume of sales and its most pressing difficulties in the Chicago market, substantial operating and financial difficulties also exist at

the present time in a number of its other plants and the situation is likely to deteriorate further in the future.

19. All of Bowman's plants are old, overcrowded, and in need of modernization. The newest plant is in Bettendorf, Iowa, and even that is over 20 years old.

20. Bowman has been unable to keep pace with the rest of the dairy industry in automation, mechanization, or materials handling trends. Bowman has not had a planned program of upgrading its operations and little money has been spent on new equipment designed to cut overhead and labor costs and to improve quality. Refrigerated storage rooms are too small to maintain adequate inventories. In most of its plants Bowman lacks the clean-in-place pipeline systems that most of the other dairies have adopted as a means of controlling sanitation. Bowman's bottling and refrigerating operations are, for the most part, out of date [fol. 89] and inefficient. Most Bowman plants do not have the automatic casers, automatic stackers, and palletized transportation systems required for an efficient dairy operation. In fact, the only plant in which Bowman has made significant capital improvements in recent years has been the River Forest plant where Bowman carried out a million dollar modernization program in 1964. Even that did not stop the losses, however. It is expected that the River Forest plant will report a continuation of the decline in sales and a loss of over $900,000 in 1965.

21. The outcome of the River Forest modernization attempt is particularly discouraging since the company cannot maintain its volume and should not pump large amounts of money into plant modernization when there is no chance that this will enable it to get an adequate return on the investment. At the same time, the failure to modernize leaves Bowman's plants at an increasing competitive disadvantage.

22. As a result of the fact that, with the one unsuccessful exception of its River Forest plant, Bowman has not reinvested money in its plants in order to keep them at the minimum industry standard, the plants have become rundown and inefficient and have had excessive operating costs. As the following tables show, in addition to its Chicago dairy operations, three of Bowman's other divisions are running in the red and four of its other divisions had declining sales in 1964:

[fol. 90] Bowman's Loss Operations

Division	Net Operating (Loss)
Chicago, Illinois	(1,571,989)
Cleveland, Ohio	(51,843)
Saginaw, Michigan	(21,905)
Parade Products, Inc.	(3,076)

Bowman's Operations With Declining Sales

Division	1963 Sales	1964 Sales	Change
Chicago, Illinois	48,993,885	46,596,008	(2,397,877)
Columbus, Ohio	3,138,937	2,717,366	(421,571)
Tomah, Wisconsin	597,014	555,020	(41,994)
Cremix	787,278	737,318	(49,960)
Forest Milk	1,373,293	1,311,952	(61,341)

Some of the divisions that are not in the red have profits far below what their profits should be and what the profits of similar operations by other dairy companies actually are. Bowman's New Albany, Indiana, division, for example, was able to show a mere $12,458 profit in 1964 despite a sales volume of $3,526,853. In 1963 a $5,969 loss was reported by New Albany.

23. Bowman has, in effect, been living off the combination of its depreciation and income from non-dairy investments and the sale of property. Bowman has been able to show slight overall profits in some years only because it has contracted dairy operations by selling off plants, [fol. 91] equipment, and other property. Since 1950 the following major property dispositions have been made by Bowman:

Closed Harvard, Illinois bottling plant
Closed La Salle bottling plant
Closed Mayfair bottling plant
Closed Montrose bottling plant
Closed Ridgeview bottling plant
Closed State Street bottling plant
Sold Terre Haute bottling plant
Closed Sales Divisions:

(a) Elston Store
(b) Englewood
(c) Evanston Retail
(d) Central Wholesale
(e) Irving Park
(f) Leyden

(g) North Industrial
(h) Oak Lawn
(i) South Shore
(j) Washington Heights

Sold Wabash Street garage
Sold Evanston Division garage
Closed Addison ice cream plant
Sold KPA Warehouse
Sold Central Office building and moved into rented facilities
Lease of Huebner plant to Michigan Milk Producers

24. Bowman's purchase of the assets of Capitol Dairy in October of 1965 had no effect on Bowman's volume since Bowman had already been bottling all of Capitol's milk for several years. Capitol had total sales in 1964 of $3,673,071 (all Bowman milk under the Capitol label). The purchase [fol. 92] price for Capitol's assets was $367,000 and much of this was recovered by liquidating Capitol's trucks and real estate. Capitol's customers were primarily the small stores which have been losing business to larger cooperative and chain supermarkets. Capitol was acquired only in the hope that Bowman's excessive distribution costs could be reduced somewhat by adding Capitol's deliveries to Bowman's existing routes.

25. In view of these and other factors, Bowman management concluded that realistically it had only two choices: sell out or adopt a program of self-liquidation.

26. It was unfeasible to think that an internal solution to Bowman's operating and financial difficulties could be found. The decline in home delivery sales, the union problems, and geographic customer dispersion made further consolidation of retail routes all but impossible. Furthermore, there was no way to dispose of the home delivery business and still have a large enough volume at the River Forest plant to maintain operating efficiency. The company had already experienced a loss in volume which had forced it to close all Chicago area bottling plants except River Forest and to dispose of a number of retail distribution branches.

[fol. 93] 27. Faced with the fact that each day the company operated it lost money and that there was no possi-

bility of bringing about an internal solution to this problem, Bowman's management concluded that the best course was to try to find an immediate buyer rather than to work out a piecemeal liquidation during the course of the next few years.

28. From casual discussions which had been had with several other dairies over the years, the management was aware that there were few, if any, companies which would be interested in purchasing Bowman's operations. Management also realized that publicity concerning its desire to sell out would lead to the raiding of Bowman's accounts by other dairies and the loss of other customers seeking a more certain future source of supply. Many accounts have already expressed uneasiness concerning their future source of milk supply. Nevertheless, in the very recent past, Bowman management discussed a possible sale with Carnation, Fairmont and Consolidated Badger. None was interested in making an offer. The orders which the Federal Trade Commission had secured against further acquisitions by the industry giants (National, Borden, Beatrice, and Foremost) precluded Bowman from considering a sale to those companies. Consideration was also given to the possibility of seeking a purchaser among companies not [fol. 94] presently in the dairy business. However, expert advice from the company's investment banker indicated that there would be no companies which would be interested in purchasing Bowman for other than liquidating purposes and that the price would be extremely low. In this state of affairs, Bowman's management approached Dean Foods Company.

29. Even Dean, the only purchaser who expressed any real interest in purchasing Bowman, was willing to pay no more than two-thirds of the company's net worth. Nevertheless, this offer was the only reasonable offer which Bowman could secure and, accordingly, management decided to accept it. Those controlling a sufficiently large percentage of Bowman's stock to effect their desires have indicated that, in the event that the proposed sale of Bowman's operating assets to Dean is not consummated, they will seek a liquidation of Bowman's dairy operations as soon as practicable. Thus, whether or not it is permitted to sell to Dean, Bowman will withdraw from the dairy business.

30. If an injunction is issued preventing the Bowman Dairy Company from selling its operating assets to the Dean Foods Company, Bowman and its shareholders, employees, and customers will suffer irreparable injury.

31. Bowman has been informed by the Dean Foods Company that if Bowman is enjoined from selling its operating assets to Dean at the present time, Dean will be forced to withdraw from the transaction entirely.

[fol. 95] 32. Cancellation of this transaction would force Bowman to continue its dairy operations until a piecemeal liquidation can be completed. Each day that Bowman continues its dairy operations in Chicago it will lose thousands of dollars and the company's net worth will continue to decline.

33. The liquidation of Bowman's operating assets on a piecemeal basis will return far less than the amount which Dean has agreed to pay and will thus cause Bowman's shareholders to suffer a substantial loss. While Dean, a dairy company capable of integrating Bowman's facilities with its own, will pay less than two-thirds book value for Bowman's net worth, Bowman can expect to receive about 50 percent of book value if Bowman is liquidated on a piecemeal basis.

34. A substantial number of Bowman's present employees will be retained by Dean if Bowman is not enjoined from selling its operating assets to Dean. If, however, Bowman is forced to dispose of its dairy operations on the basis of a piecemeal liquidation, almost all of the company's employees will eventually be discharged.

35. An injunction preventing the smooth transfer of Bowman's dairy operations to Dean and forcing Bowman to liquidate will severely disrupt the milk supply to Bowman's customers, including many store accounts which have relied on and promoted the "Bowman" name.

[fol. 96] 36. If the proposed transaction is enjoined and Bowman is forced to liquidate its dairy operations on a piecemeal basis, the national giants of the dairy industry, at least one of which is in each of the markets which Bowman serves, will probably succeed in taking over many of Bowman's choicest accounts and thus add further to their market dominance.

37. Considering, among other things, the fact that Bow-

man would be compelled to liquidate its dairy operations if it did not sell out to Dean and the fact that there is no purchaser available other than Dean in a position to continue Bowman's dairy operations, it is affiant's opinion that the sale of Bowman's operating assets to Dean could not have any adverse effect on competition in general or on any supplier, customer or other dairy company in particular. If the transaction is enjoined, however, Bowman and its stockholders, employees, and customers will suffer irreparable injury.

In Witness Whereof the undersigned has executed this affidavit this 5th day of January, 1966.

Francis H. Kullman, Jr.

Subscribed and sworn to before me this 5th day of January, 1966.

Donna R. Nielsen, Notary Public.

[fol. 97] STATE OF ILLINOIS,
COUNTY OF COOK, ss:

AFFIDAVIT OF SAM E. DEAN IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

SAM E. DEAN, being first duly sworn, on oath deposes and says that:

1. Since 1930 he has been employed by and since 1952 has been Chairman of the Board of the Dean Foods Company.

2. The Dean Foods Company is a medium-sized, regional processor and distributor of dairy products and convenience foods with operations centered in the Midwest. Dean had 1964 sales of approximately $73,000,000, of which $65,460,000 were attributable to dairy products and $7,540,000 were attributable to convenience foods.

3. Prior to 1939 the Dean Milk Company—predecessor of the Dean Foods Company—was engaged primarily in the manufacture of powdered and condensed milk. In 1939, however, Dean began bottling milk at its plant in Chemung, Illinois. Dean concentrated its efforts on securing distribu-

tion of its dairy products through retail stores rather than through sales on home delivery routes. During the course of the next twenty years, Dean's sales grew steadily and its profits were satisfactory.

4. There has been a trend in recent years by chain stores and cooperative buying associations of independent stores [fol. 98] to introduce dairy products carrying private labels into their stores and, in many cases, eventually to begin to produce these dairy products themselves rather than purchase them from existing dairy companies. This development has had a significant competitive impact, particularly for independent grocers and independent non-affiliated dairy companies like Dean. Safeway took the lead in introducing private labels into grocery stores and now supplies its own dairy products to almost all its stores throughout the country. Safeway already has 16 captive fluid milk plants and larger dairy sales than Dean. Kroger has established its own plants in Indianapolis and Cincinnati, recently opened an additional plant in Dayton and is building a plant in Detroit. In Chicago the Certified cooperative chain owns Country's Delight and Scot Lad, a voluntary chain, owns Meadowmoor Dairy. A & P recently announced that it will also embark upon a private label program.

5. Because of the recent increase in the number of these captive dairies, independent non-affiliated dairy companies must maintain a high degree of efficiency in order to supply independent grocers and small chain stores with low cost dairy products that will enable them to continue to successfully compete with stores owning captive dairies. Any substantial loss in volume by an independent dairy increases the difficulty of maintaining the efficiency needed to compete effectively with the captive dairies.

6. In part because it recognized the growing trend by both chain and independent supermarkets to acquire or build their own dairy plants, Dean decided in the early [fol. 99] 1960's to embark upon a program of diversifying its product line. To this end the corporation's name was changed from the Dean Milk Company to the Dean Foods Company and Dean entered into the preparation and distribution of convenience food products such as pickles, relishes, cranberry products, salads, salad dressings, mayonnaise, and frozen prepared foods.

7. Despite this move, as the following table shows, there has been but a slight increase in Dean's sales and the company's profits have declined; in 1964 both sales and profits were down:

	1962	1963	1964
Net Sales	$72,325,226	$73,445,996	$72,999,745
Net Operating Profit	3,738,752	3,028,052	2,938,072

8. Over the years the Jewel Tea Company chain of stores has come to represent the largest outlet for Dean's dairy products. In 1964, for example, Dean sold over 20 percent of the dairy products which it produced to Jewel. In the Chicago area the figure was much higher, with Jewel purchasing over 75 percent of the milk which Dean sold in the Chicago market.

9. The Jewel Tea Company has recently notified Dean that it is considering an imminent switch to a private label and, in addition, producing its own dairy products and terminating its supply arrangements with Dean. Such a move by Jewel will have a significant adverse effect on Dean. There will be a substantial drop in profits, several plants will be left with substantial over-capacity, and some will probably have to be closed. Loss of volume will cause production cost per unit of milk to rise and will handicap [fol. 100] Dean's ability to offer significant and effective competition to the giants of the dairy industry.

10. The threatened imminent loss of the Jewel account has focused the Dean management's attention on the fact that its market position is extremely vulnerable and that immediate steps must be taken to broaden its distribution base if Dean is to remain a viable competitor in the dairy industry and if Dean is to continue to supply the low cost milk which is needed by independent grocers in order to remain competitive with those stores owning captive dairies. It was only in light of these factors that Dean gave serious consideration to Bowman's offer to sell out.

11. It is the opinion of the Dean management that the Dean and Bowman operations can be combined into an effective and healthy medium-sized dairy operation. Dean is probably unique in its ability to restore Bowman's operations to a profitable basis. While Bowman is unable to cure their problems from within, by combining the two operations there will be sufficient plant, equipment, and

customer flexibility to integrate them effectively. Dean plans to dispose of substantially all of Bowman's Chicago home delivery routes (approximately $20,000,000, or 50 percent of Bowman's total packaged milk sales in the Chicago market) by selling them to a number of small dairies. Negotiations with several of these smaller dairies have already begun. This will strengthen these dairies as well as Dean by enabling them to reduce distribution costs through route consolidation. Because of their small size, less onerous union contract enforcement, and combined ownership-management, these smaller dairies can operate [fol. 101] the home delivery business at a profit whereas Bowman cannot. Lack of replacement sales volume prevents Bowman from disposing of this business itself. Were Bowman to do so its plant would be operating substantially below capacity and cost per unit of milk would increase significantly.

12. Dean supplies approximately 7 percent of the dairy products sold in the Chicago area and it has been estimated that Bowman may supply as much as 16 percent. The Dean-Bowman transaction, however, will not raise Dean's share of the market to 23 percent. On the contrary, about 50 percent of the milk which Bowman produces is distributed on retail home delivery routes and, as already indicated, immediately following the transaction Dean will distribute substantially all of these routes among a number of the smaller dairies. Thus, even if Dean did not face the prospect of losing the Jewel account, the net effect of the transaction would be the creation of a single, healthy, medium-sized dairy of approximately the same size as Bowman's present operations and the simultaneous strengthening of a number of small dairies servicing the Chicago market. Since it is likely that Dean will, in fact, lose the Jewel Tea account, the most probable effect of the transaction will be to create a healthy medium-sized dairy which is slightly larger than Dean's present operations but substantially smaller than Bowman's present operations while strengthening a number of the smaller dairies.

13. If Bowman is enjoined from selling its operating assets to the Dean Foods Company, Dean will withdraw [fol. 102] from the entire transaction. Each day that Bowman remains in business its losses mount and the net worth

of its dairy operations declines. An injunction preserving the status quo would create an intolerable situation for Dean. Bowman's value would rapidly fall below the agreed upon purchasing price while Dean's ability to effectively integrate its operations with those of Bowman would constantly diminish. From Dean's standpoint completion of the transaction depends upon Dean's freedom to undertake immediate efforts to restore Bowman's operations to a profitable basis by transferring Bowman's home delivery routes to a number of smaller dairies, closing those Bowman plants which are old, inefficient and in need of modernization, and shifting the remaining volume to other facilities.

14. Enjoining the Dean-Bowman transaction would prevent the transfer of milk distribution which presently accounts for approximately 8 percent of the total Chicago area milk sales and 50 percent of Bowman's Chicago sales to a number of the smaller dairies in the Chicago area.

15. Considering among other things that the real effect of the Dean-Bowman transaction will be the creation of a healthy medium-sized dairy company and the strengthening of a number of smaller dairy companies, the sale of Bowman's operating assets to the Dean Foods Company will not pose any conceivable threat to competition, but, rather, will increase the ability of a substantial number of dairy companies to compete effectively. If the transaction is enjoined, however, Dean, Bowman, and a number of [fol. 103] other dairies in the Chicago area will suffer unwarranted and irreparable injury.

In Witness Whereof the undersigned has executed this affidavit this Fifth day of January, 1966.

Sam E. Dean.

Subscribed and Sworn to before me this 5th day of January, 1966.

Judith A. Wons, Notary Public.

[fol. 104] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF WILLIAM S. TURNER IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

WILLIAM S. TURNER, being first duly sworn on oath deposes and says that:

1. He is a Senior Vice President of The Northern Trust Company in charge of its Trust Department with offices at 50 South La Salle Street, Chicago, Illinois.

2. The Northern Trust Company is co-executor of the estate of the late Lula E. Bowman, which holds the largest single block of stock in the Bowman Dairy Company. It is also residual co-trustee of the stock under a charitable trust. Included in the Lula E. Bowman estate are 32,600, or approximately 21 percent, of the 153,400 shares of Bowman stock issued and outstanding.

3. The Northern Trust Company, in its fiduciary capacity as co-executor and as co-trustee of the Lula E. Bowman estate, carefully and independently evaluated their future income requirements and the advisability of maintaining the present investment in Bowman stock, particularly in light of the company's existing dairy operations.

[fol. 105] 4. After a careful consideration of the present condition and future prospects of Bowman, The Northern Trust Company concluded that the continued operation of Bowman's dairy business on its present basis was unwarranted and that these operations should preferably be sold as a package or, if necessary, liquidated on a piecemeal basis and the funds generated from such a sale or liquidation re-invested elsewhere.

5. In accordance with its fiduciary obligations, The Northern Trust Company considered the prospects of securing an alternative offer to that received from the Dean Foods Company. While Dean's offer was less than two-thirds of Bowman's net worth, it was the judgment of The Northern Trust Company that if the Dean offer could not be consummated it appeared likely that the only alternative was a program of self-liquidation or a sale to a company which would itself immediately liquidate Bowman's dairy operations. The Northern Trust Company concluded that the

return from such a liquidation program would be extremely low and that Dean was the only company that showed any interest in acquiring Bowman.

[fol. 106] 6. If Bowman is unable to sell its operating assets to Dean, The Northern Trust Company, as executor of approximately 21 percent of Bowman's stock, is fearful that liquidation of Bowman's dairy operations on a piecemeal basis is its only alternative.

In Witness Whereof the undersigned has executed this affidavit this 3rd day of January, 1966.

William S. Turner.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Betty J. Conlin, Notary Public.

My Commission Expires August 10, 1968.

[fol. 107] State of Illinois,
County of Cook, ss:

Affidavit of E. Vance Clark in Opposition to the Federal Trade Commission's Motion for a Preliminary Injunction

E. Vance Clark, being first duly sworn, on oath deposes and says that:

1. For twenty years until 1964 he was a senior Trust Officer of the Central Trust Company of Cincinnati, Ohio, and as such Trust Officer had extended experience in examining and advising in reference to investments.

2. During this period of time I have acted as financial adviser to my aunt, Esther T. Bowman, who holds 14,600 shares of Bowman stock in her own name and 2,000 shares as trustee for her sisters. My wife and I own between us 2,000 shares of the said Bowman stock. There are outstanding 153,400 shares. The 18,600 shares so represented are approximately 12 percent of the issued and outstanding stock.

[fol. 108] 3. As such financial adviser to Esther T. Bowman and on behalf of myself and my wife as stockholders, I have carefully and independently evaluated the future income possibilities and the advisability of maintaining the present investment in Bowman stock, particularly in light of the company's existing dairy operations. I have also examined the feasibility of making further attempts to restore Bowman's dairy operations to a profitable basis through internal efforts.

4. After a careful consideration of the present condition and future prospects of Bowman, I have concluded and advised my aunt that the continued operation of Bowman's dairy business was totally unwarranted and that these operations should preferably be sold as a package or, at the very least, liquidated on a piecemeal basis and the funds generated from such a sale or liquidation re-invested elsewhere.

5. I have examined independently the offer received from Dean Foods Company. While Dean's offer amounts to less than two-thirds of Bowman's net worth, it was my judgment that the only alternative to the Dean offer was a program of self-liquidation or a sale of the company which [fol. 109] would itself immediately liquidate Bowman's dairy operations. I have concluded that the return from such a liquidation program would be extremely low and that the Dean offer would present a better return on the investment.

6. If Bowman is unable to sell its operating assets to Dean, as financial adviser to my aunt, Esther T. Bowman, I will, as her proxy, seek an immediate liquidation of Bowman's dairy operations on a piecemeal basis.

In Witness Whereof the undersigned has executed this affidavit this 3rd day of January, 1966.

E. Vance Clark.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Florence M. Lundquist, Notary Public.

[fol. 110] STATE OF ILLINOIS,
COUNTY OF COOK,

AFFIDAVIT OF JOHNSTON A. BOWMAN IN THE MATTER OF DEAN FOODS, INCORPORATED AND BOWMAN DAIRY COMPANY FOR PRELIMINARY INJUNCTION BY THE FEDERAL TRADE COMMISSION.

I, JOHNSTON A. BOWMAN, being first duly sworn depose and say that:

1. I am Vice-Chairman of the Board of Bowman Dairy Company, an Illinois Corporation,
2. That of the issued and outstanding shares of Bowman Dairy Company 12,840 stand in my name,
3. That I have acted as proxy for a period of twenty-four years on behalf of my daughter, Aveline Bowman Huntress, owner of 7,000 shares,
4. That I have acted as proxy for Virg & Co. trustees of a living trust for my sister, Grace Bowman Jones, voting as such proxy 8,560 shares,
5. That I have examined the audit reports prepared by Arthur Andersen & Company for the years 1960 to 1964, covering the Chicago operations of the package milk sales of Bowman Dairy Company in the area covered by the Market Order #30 issued by the U. S. Department of Agriculture.
6. I am also familiar with the unaudited figures supplied by the controllers for Bowman Dairy Company for the first eleven months of the year 1965.
7. That as a former treasurer of the company, as Chairman of the Finance Committee of the Company and as a Financial Advisor to the individual holdings of stock here and above listed I am of the opinion that a further commitment by the equity holders of Bowman Dairy Company in the Chicago area is not indicated. It is further my opinion that the operations of the Company in this area should be, in the most advantageous way available, liquidated.

Johnston A. Bowman.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Phil A. Nelson, Notary Public.

[fol. 111] STATE OF ILLINOIS,
COUNTY OF COOK, ss:

AFFIDAVIT OF LEONARD SPACEK REGARDING THE REQUEST OF THE FEDERAL TRADE COMMISSION FOR A PRELIMINARY INJUNCTION.

LEONARD SPACEK, first being duly sworn, on oath deposes and says:

1. That he is a certified public accountant in the State of Illinois, is a partner and chairman of the accounting firm of Arthur Andersen & Co. and has been in public accounting practice continuously since 1928.
2. The attached Statement of Net Operating Losses from Dairy Operations of Bowman Dairy Company (an Illinois corporation) was prepared from annual financial reports certified to by Arthur Andersen & Co., who have been the independent public accountants for Bowman Dairy Company since 1927.

   For the five years, 1960 through 1964, losses attributable to dairy operations in the Chicago, Illinois, area totaled $3,683,731. Substantial losses have been incurred in each of the five years; $197,459 in 1960, $678,127 in 1961, $618,315 in 1962, $617,841 in 1963 and $1,571,989 in 1964. Preliminary estimates by Bowman Dairy Company for the year 1965 indicate a loss of approximately $900,000 on a sales volume of $43,900,000.

   During this five-year period, net sales have declined from $62,095,506 to $47,577,268 but there have not been offsetting decreases in costs and expenses.

   This series of losses has had a significantly adverse effect on the working capital of the company and raises serious financial and operating questions as to the advisability of continuing the dairy operations in Chicago by Bowman Dairy Company.

Leonard Spacek.

Subscribed and sworn to before me this 5 day of January, 1966.

Mildred B. Heskett.

[fol. 112]

BOWMAN DAIRY COMPANY
(an Illinois Corporation)

(Corporate—Exclusive of Subsidiaries)

Statement of Net Operating Losses From Dairy Operations
for the Five Years Ended December 31, 1964

	Year Ended December 31					
	1964	1963	1962	1961	1960	Total
Net Sales	$ 47,577,268	$ 55,818,175	$ 58,344,131	$ 59,821,301	$ 62,095,506	$283,656,381
Cost of Sales	34,730,343	40,996,651	41,877,610	43,523,839	45,117,913	206,246,356
Gross profit on sales	$ 12,846,925	$ 14,821,524	$ 16,466,521	$ 16,297,462	$ 16,977,593	$ 77,410,025
Operating Expenses:						
Delivery	$ 12,079,085	$ 12,908,267	$ 14,248,170	$ 14,013,649	$ 14,296,263	$ 67,545,434
General selling and administration	2,339,829	2,531,098	2,836,666	2,961,940	2,878,789	13,548,322
	$ 14,418,914	$ 15,439,365	$ 17,084,836	$ 16,975,589	$ 17,175,052	$ 81,093,756
Net operating losses from dairy operations	$ (1,571,989)	$ (617,841)	$ (618,315)	$ (678,127)	$ (197,459)	$ (3,683,731)

[fol. 113] State of Illinois,
County of Cook, ss:

Affidavit of Walter Schaub in Opposition to the Federal Trade Commission's Motion for a Preliminary Injunction

Walter Schaub, being first duly sworn, on oath deposes and says that:

1. He is the Chairman of the Board of Scot Lad Foods, Inc. and the President of Meadowmoor Dairy Company, one of its divisions, with offices at 1500 East 97th Street, Chicago, Illinois.

2. It is his best recollection that some time during the week of November 29, 1965, he talked with Henry A. Soldwedel, President of Sidney Wanzer & Sons, Inc., on the telephone. During the course of that conversation, Mr. Soldwedel stated that he understood Bowman was considering a sale of its dairy operations and that Bowman was negotiating with Dean.

3. As affiant told Mr. Soldwedel during the foregoing telephone conversation, affiant does not believe that a sale of Bowman's dairy operations to Dean will have any adverse effect on Meadowmoor's dairy business or on competition in the dairy industry generally. Dairy competition, especially in the Chicago market, is extremely vigorous and tending to become more so.

In Witness Whereof the undersigned has executed this Affidavit this 3rd day of January, 1966.

Walter B. Schaub.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Muriel F. Rosebraugh, Notary Public.

[fol. 114] STATE OF ILLINOIS,
County of Cook.

AFFIDAVIT OF WALTER E. RONEY

I, WALTER E. RONEY, President of the Roney Ice Cream Company, being first duly sworn depose and say that on Thursday, November 11, 1965, I had lunch with Henry Soldwedel and Robert Smith. At this time, Henry Soldwedel told me that there was a merger contemplated between Bowman Dairy Company and Dean Foods, Inc. He stated that one of the Bowman widows, who controlled a large block of stock, had died and that because of the problems arising in the settling of the estate, this merger was being contemplated.

Walter E. Roney

Subscribed and Sworn to before me this 4th day of January, 1966.

Johanna Koris, Notary Public.

[fol. 115] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF FRED NONNAMAKER IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

FRED NONNAMAKER, being first duly sworn, on oath deposes and says that:

1. I am the Executive Secretary of the Associated Milk Dealers, Inc., with offices at 309 West Jackson, Chicago, Illinois. The Associated Milk Dealers, whose membership consists of approximately 30 milk processors and distributors in the Chicago milk marketing area, represents substantially all of the dairies in the market.

2. I was first employed by the Association in 1936 and have acted as its Executive Secretary since 1948. In my capacity as Executive Secretary, I have intimate daily contact with milk processors and distributors, both large and

small, in Chicago and throughout the nation. Through the years I have become fully acquainted with the Chicago milk market and the problems of the dairies serving the area. Among other duties, I have participated in the labor negotiations of the Association's membership, presented the Association's position at Federal Milk Marketing Order hearings and participated in the activities of the Milk Industry Foundation, which is the industry's national trade association.

3. Based upon my long acquaintance with the Chicago market and the dairy industry generally, it is my firm con- [fol. 116] viction that Bowman's sale of its dairy operations to Dean will have no conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally. There are presently a large number of aggressive and vigorous dairies in the Chicago market and it has been my observation that competition has been increasing rather than decreasing. I cannot conceive that the Dean acquisition would give it any market power which would permit it to adversely affect the operations of smaller dairies in the Chicago market. On the contrary, it is my understanding that Dean plans to sell Bowman's home delivery routes to many of these smaller firms and this step will significantly strengthen the competitive vitality of these firms by giving them an opportunity to reduce their distribution and processing costs and increase their operating efficiency.

In Witness Whereof the undersigned has executed this affidavit this 4th day of January, 1966.

Fred Nonnamaker.

Subscribed and Sworn to before me this 4th day of January, 1966.

Sandra B. Mitchell, Notary Public.

[fol. 117] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF A. L. MCWILLIAMS IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

A. L. MCWILLIAMS, being first duly sworn, on oath deposes and says that:

1. He is General Manager of the Pure Milk Association. Pure Milk Association is a dairy farmer cooperative with approximately 11,000 dairy farmer members in Illinois, Indiana and Wisconsin. Pure Milk Association is the largest farmer cooperative in the Chicago market and supplies most of the dealers in the marketing area with the major part of their milk supply.

2. Prices to farmers will not be affected by Bowman's sale of its dairy operations to Dean because prices to farmers are determined through a Federal order and a superpool. Federal order prices are established by the U. S. Department of Agriculture after a public hearing in which all interested parties have an opportunity to participate. The size of the handlers is not important in this price-making process. Superpool prices are established by Federated Dairy Cooperatives, a bargaining association which represents 85 percent of the milk delivered to the Chicago mar-
[fol. 118] ket by farmers. Pure Milk Association is a member of the Federated Dairy Cooperatives. There is no reason to believe that this price arrangement would be either helped or hurt by the fact that the Dean and Bowman operations were combined.

3. Affiant understands that, following the acquisition, Dean plans to sell a substantial portion of Bowman's business to smaller dairies in the Chicago area. It is affiant's opinion that such a step will benefit the smaller dairies and increase their competitive vitality.

4. Pure Milk Assocation operates a relatively small dairy servicing the Chicago market. It is affiant's opinion that the proposed sale of Bowman's dairy operations to Dean will not adversely affect this dairy operation or those of other small dairies servicing the Chicago market.

5. Finally, in affiant's opinion the proposed sale of Bow-

man's dairy operations to Dean will actually benefit the interests of Pure Milk Association's members for the following reasons:

a. The dairy business needs vigorous promotion, advertising and sales effort. Dean has done an outstanding job in this area and affiant believes that the promotion of milk would probably be increased as a result of the sale.

b. The best interests of farmers are served by reducing the price spread between the producer and the consumer. This can best be done through efficient operations. Af- [fol. 119] fiant believes that efficiency would be increased by the proposed sale.

c. Dairy farmers generally, and Pure Milk Association in particular, have enjoyed good relationships with both companies and affiant anticipates that these relationships will be continued.

In Witness Whereof the undersigned has executed this affidavit this 5th day of January, 1966.

A. L. McWilliams.

Subscribed and Sworn to before me this 5th day of January, 1966.

Peggy J. La Barbera, Notary Public.

[fol. 120] State of Illinois,
County of Cook, ss:

Affidavit by Anthony C. Karlos in Opposition to the Federal Trade Commission's Motion for a Preliminary Injunction

Anthony C. Karlos, being first duly sworn, on oath deposes and says that:

1. He is the Chairman of the Board of Grocerland Co-Operative, Inc., with offices at 3636 West 51st Street, Chicago, Illinois. Grocerland is a cooperative owned by independent retail grocers which performs a purchasing and warehousing function for its members.

2. That some member retailers of Grocerland presently purchase their milk supplies from Dean. It is affiant's firm conviction that Dean's acquisition of the dairy operations of Bowman will have no adverse effects on Grocerland or its members. Nor can affiant conceive that the sale to Dean will have any anticompetitive effects on other grocery retailers or on competition in the dairy industry. There is no likelihood that Dean's acquisition of Bowman's dairy operations will give it the market power to charge other than competitive prices for its dairy products. Furthermore, there are many alternative milk suppliers to whom Grocerland and its members could turn should this unlikely event occur.

3. A number of grocery chains have recently entered the dairy business in order to supply the milk needs of their own stores. It is affiant's belief that these large [fol. 121] grocery firms will use the cost savings which may be derived from such vertical integration to reduce the retail prices on the dairy products sold through their stores. If independent grocers such as the members of Grocerland are to remain competitive with such vertically integrated chains, they must be able to purchase their milk from efficient independent dairy companies. Affiant firmly believes that Dean's acquisition from Bowman of its dairy operations will enable Dean to remain competitive in the dairy industry and to supply independent grocers with milk at the lowest possible prices. In view of Dean's plan to resell a substantial part of Bowman's volume to other independent dairies in Chicago, affiant believes that this transaction will also strengthen these smaller firms and better enable them to supply their independent customers.

In Witness Whereof the undersigned has executed this Affidavit this 5 day of January, 1966.

Anthony C. Karlos.

Subscribed and sworn to before me this 5 day of Jan, 1966.

Ernest R. Nassos, Notary Public.

[fol. 122] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

MOTION TO MAINTAIN CONFIDENTIALITY—Filed January 6, 1966

Now come the respondents, Dean Foods Company and Bowman Dairy Company, by their attorneys, and respectfully move that respondents' joint brief and affidavits filed on January 5, 1966, be retained in a confidential file, for the reasons that the detailed factual information and data revealed in the affidavits and summarized in the brief have not previously been disseminated to the general public and are necessarily disclosed in this proceeding for the purpose of demonstrating the lack of any merit or substance in the Federal Trade Commission's position herein; respondents believe that present publication of the detailed facts and statistics revealed in their affidavits and briefs, (particularly to the competitors of respondents) would seriously and adversely affect the businesses of both the respondents. Granting of the relief herein requested could in no way harm or prejudice the petitioner.

[fol. 123] In support of which is submitted the attached affidavit of Hammond E. Chaffetz.

Respectfully submitted, Edward I. Rothschild, L. Edward Hart, John Paul Stevens, Attorneys for Respondent, Bowman Dairy Company.

Hammond E. Chaffetz, Lawrence Gunnels, William R. Jentes, Attorneys for Respondent, Dean Foods Company.

[fol. 124] AFFIDAVIT

STATE OF ILLINOIS,
County of Cook, ss:

HAMMOND E. CHAFFETZ, being duly sworn on oath, deposes and says that as attorney for respondent Dean Foods Company he has been advised by the managing officers of both respondents that they believe that present divulging of the facts and data contained in respondents' joint brief and affidavits to the general public and respondents' competitors would cause serious detriment to the respondents' businesses.

Hammond E. Chaffetz.

Subscribed and Sworn to before me this 6th day of January, 1966.

——, ——, Notary Public

[fol. 125] Proof of Service (omitted in printing.)

[fol. 126-136] [File endorsement omitted]

Reply Memorandum for Petitioner—Filed January 6, 1966 (omitted in printing.)

[fol. 137] EXHIBIT I

AFFIDAVIT OF SCOTT A. WALKER

CITY OF WASHINGTON,
District of Columbia, ss:

My name is SCOTT A. WALKER. I am an economist in the Division of Economic Evidence, Bureau of Economics, Federal Trade Commission. My business address, and that of the Federal Trade Commission, is Washington, D. C., 20580. My qualifications as an economist and expert on the dairy industry are summarized in my affidavit of December 28, 1965, in which I concluded that the proposed acquisition of Bowman Dairy Company by Dean Foods Company will lessen competition substantially and tend to create a monopoly in the sale and distribution of packaged milk in the Chicago Area.

I have further examined the files of the Federal Trade Commission respecting the Bowman acquisition by Dean, and other data on the dairy industry available in the Commission's files. I have also read the various affidavits contained in the appendix to the joint brief filed by Dean and Bowman in the case of *Federal Trade Commission* v. *Dean Foods Company and Bowman Dairy Company* (Docket No. 15493. As a result of my further study, I have reached four additional conclusions which I believe are relevant to an evaluation of this merger's probable impact on the competition in the Chicago packaged milk market:

[fol. 138] 1. Dean states its belief that it may lose its principal wholesale account in the Chicago Area—Jewel Tea Company, that Jewel is considering backward integration through the construction or purchase of its own packaged milk processing plant. It is asserted, on the basis of the projected possible loss of the Jewel account, that Dean's present 7% market share is not an accurate indicator of its market position or of the impact of the Dean-Bowman merger. Dean, however, has a reputation in the dairy industry of being an extremely able and aggressive competitor, and it is quite unlikely that Dean would stand by idly while such a significant portion of its business in the Chicago Area was being lost. Indeed, if Dean were prevented from acquiring Bowman, and if it were in fact to lose its principal

customer, it is probable that Dean would become a more vigorous competitor—offering better service and perhaps lower prices—in order to offset the possible loss in market share.

2. The affidavit of Mr. Francis H. Kullman, Jr., Chairman of the Board of Bowman Dairy Company, states on p. 6:

> "The larger dairies having home delivery business (such as Borden and Hawthorn Mellody) also enjoy advantages over Bowman. These companies distribute a much larger percentage of their milk on wholesale routes. With this large wholesale volume to fill their plants, they have been able to eliminate their less efficient routes completely and preserve only their high volume, relatively low cost retail routes. Bowman, on the other hand, has had a relatively small percentage [fol. 139] of its volume in the wholesale business. Any attempt to trim its routes as Borden and Hawthorn Mellody have done would mean running the River Forest plant at less than 50 percent capacity with the result that the cost per unit of milk would rise sharply."

I fully agree that a dairy company which has a large wholesale volume is better able to compete in the retail home delivery business. As stated by Mr. Kullman, this permits such a company to operate at a higher percentage of capacity with resulting lower cost per unit of milk.

If Dean were to acquire Bowman, Dean, too, could capitalize on the advantages of a relatively large combined wholesale volume to preserve the more desirable Bowman retail routes. It is unrealistic to argue that no attempt would be made to attain this objective. Accordingly, it is unrealistic to contend that Dean will lose one half of Bowman's market share after the merger.

3. There are only four really significant competitors in the packaged milk business in the Chicago Area. These are Bowman, Borden, Dean, and Hawthorne-Mellody. The remaining firms in this market are for the most part small, locally-owned, and locally-operated businesses. In my opinion, it would be better for competition in the Chicago Area if Bowman were liquidated or its assets sold piecemeal, than to permit one of the other three leading sellers to succeed to Bowman's market position. If Bowman were liquidated,

its 16% market share could reasonably be expected to be [fol. 140] distributed among all of the competitors in the market, thereby reducing the level of concentration in this market and improving the state of competition.

4. Dean points to a decrease in the market shares held by the four largest companies between 1954 and 1961 as being demonstrative of "the competitive vitality of the smaller dairies in the Chicago area". It should be noted, however, that during this same period, the total number of competitors in the Chicago market declined from 107 to 70. By 1965, this number had declined still further, to 57. This reduction in the number of competitors represents a significant increase in over-all concentration, and the four largest still command a formidable share of total sales.

Scott A. Walker.

Subscribed and sworn to before me, a Notary Public in and for the County of Cook, State of Illinois, on this 6th day of January, 1966.

Steve Babyar.

My Commission expires on April 21, 1968.

[fol. 141] Certificate of Service (omitted in printing.)

[fol. 142] [File endorsement omitted.]

[fol. 143] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

FEDERAL TRADE COMMISSION, Petitioner,

vs.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

Transcript of Proceedings—January 6, 1966

had at the hearing of the above-entitled cause in the courtroom of the Seventh Circuit Court of Appeals, United States Court House, Chicago, Illinois, before Hon. ELMER J. SCHNACKENBERG and Hon. LUTHER M. SWYGERT, Judges of said Court, on Thursday, January 6, 1966, commencing at the hour of 2:00 o'clock p.m.

PRESENT:

Mr. James McI. Henderson, Mr. Frederick H. Mayer, Mr. Richard H. Stern and Mr. Peter Bleakley, (Federal Trade Commission, Washington, D.C.)

Messrs. Kirkland, Ellis, Hodson, Chaffetz & Masters, (Prudential Plaza, Chicago, Illinois), by Mr. Hammond E. Chaffetz and Mr. William R. Jentes, appeared for respondent Dean Foods Company, and Messrs. Rothschild, Hart, [fol. 144] Stevens & Barry, (Suite 820, 120 South La Salle Street, Chicago 3, Illinois), by Mr. John Paul Stevens, appeared for respondent Bowman Dairy Company.

[fol. 145] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Schnackenberg: The Court has before it the case of File No. 15,493, Federal Trade Commission against Dean Foods Company and Bowman Dairy Company. This matter is before the Court on various motions and responses.

Are all counsel present and ready to proceed with the motions?

Mr. Chaffetz: Ready, your Honor.

Mr. Henderson: Ready, your Honor.

Judge Schnackenberg: Because of the fact that there are several motions, have counsel any suggestions as to how much time the Court might allow on each side for arguments?

Mr. Henderson: The Government would like forty-five minutes, your Honor, if we may have it.

Judge Schnackenberg: Which side are you representing?

Mr. Henderson: The Federal Trade Commission.

Mr. Chaffetz: Your Honor, we would try to stay within forty-five minutes, but if we needed an hour, we would like to feel we could have it for both Dean Foods and Bowman Dairy combined.

Judge Schnackenberg: Ordinarily, as our rules provide, forty-five minutes is allowed on each side. However, be-
[fol. 146] cause of the situation in this matter, it might be necessary for counsel to have a little more time.

We will use forty-five minutes as the target, but if you run over and do not exceed an hour, you will not be in contempt of court.

Mr. Chaffetz: Thank you, your Honor.

Mr. Henderson: May we have equal time, your Honor?

Judge Schnackenberg: Yes. Certainly.

Mr. Henderson: Thank you, your Honor.

Judge Schnackenberg: There are several matters, all of which will probably be involved in this discussion, but the petition for preliminary injunction is probably the matter that should be discussed first, and from there on you will have to cover the other aspects of the situation in logical order.

Mr. Stern, you may proceed for the petitioner.

Mr. Henderson: Your Honor, before Mr. Stern begins his argument, and he will make the argument for the Federal Trade Commission, I should like to present Mr. Frederick Mayer, who is the Senior Attorney for Merger Mat-
[fol. 147] ters for the Federal Trade Commission.

I have asked him to attend in the event we have any problems that may come up in regard to mergers in which he can assist the Court.

Judge Schnackenberg: You will put him in if the other man is taken out, is that it?

Mr. Henderson: That is right.

Judge Schnackenberg: We are glad to have you here, Mr. Mayer.

Mr. Mayer: Thank you, your Honor.

Judge Schnackenberg: Mr. Stern, you may proceed.

ARGUMENT ON BEHALF OF FEDERAL TRADE COMMISSION BY MR. STERN

Mr. Stern: May it please the Court:

The Federal Trade Commission has brought this case here to test out an important jurisdictional issue arising under the antimerger laws administered by the Commission.

The issue is whether this Court has the power to enter an order protecting its appellate jurisdiction over Federal Trade Commission proceedings.

More specifically, the question is, does this Court have jurisdiction to enter a preliminary injunction against a [fol. 148] merger or to enter some other protective order to prevent the dissipation or destruction of the assets involved, this during the pendency of the administrative proceeding.

With the Court's permission, I will take up our points in this order: the threshold question is jurisdiction, I think, and I think is the major issue to be resolved. There is a conflict of Circuits on this point, as the Court is aware.

Judge Schnackenberg: Jurisdiction of the Commission or the Court?

Mr. Stern: Your Honor, the jurisdiction of the Court. I might say that what we are concerned with throughout these proceedings is the jurisdiction of the Court. We are not asking the Court to protect the jurisdiction of the Commission. We are asking it to protect its own jurisdiction, as I shall attempt to show.

Judge Schnackenberg: By some pleadings filed later in this case, there is some question raised as to the jurisdiction of the Commission, too.

Mr. Stern: I will be glad to respond to that point in addition to the other points.

Judge Schnackenberg: This does not make our problem [fol. 149] any easier.

Mr. Stern: I will treat that as my first point.

Judge Schnackenberg: All right.

Mr. Stern: If I may, may I just list the points I do want to cover.

I will cover the point which your Honor raised first, and then I will go to the jurisdiction of the Court, which is the issue on which there is a conflict of Circuits, and it is, as I said, the threshold issue because only if we are able to convince the Court on this issue does it become necessary to reach any other issue in the case.

Judge Schnackenberg: That is the issue of the jurisdiction of what?

Mr. Stern: The jurisdiction of this Court of Appeals to enter a preliminary injunction or other protective order in the premises.

With respect to the second point, I want to make a single comment on the International Shoe defense, or the so-called failing company defense.

The remaining point, the last point, is our showing that the merger is probably illegal and thus will probably be adjudicated to violate Section 7 of the Clayton Act and [fol. 150] Section 5 of the Federal Trade Commission Act.

This last point is covered at some length in our main brief and in our reply brief.

I have not mentioned one other point and that point is, of course, whether there is a showing of necessity for preliminary relief in this case.

This is a point, however, upon which I do not think there is any serious factual dispute, because petitioner and respondent are agreed that after the merger takes place, the assets in question will disappear. Dean will close down various Bowman plants, it will consolidate Bowman's and Dean's operations and the Bowman assets and working capital will be divorced from the business and distributed elsewhere.

There is, I believe, no factual dispute on this point and I think the parties are agreed that once the merger is completed, it will be virtually impossible to restore the status quo in the sense of restoring Bowman to the Chicago market.

I will now turn to the question raised by Judge Schnackenberg, whether the Commission had any jurisdiction to [fol. 151] act in this case.

The Federal Trade Commission issued a complaint under Section 7 of the Clayton Act and under Section 5 of

the Federal Trade Commission Act, and I have the statutes here with me.

Section 7 is 15 U.S. Code, Section 18, and Section 5 is 15 U.S. Code, Section 45A(1).

There are, in addition to these substantive provisions which define the violations in question, what you might call the empowering provisions which I think are perhaps more in issue than the substantive provisions.

These are the parts of the statute that say the agency shall issue a complaint or is authorized to start a proceeding in such-and-such circumstances.

For example, under the Federal Trade Commission Act, Section 5A(6) provides that, "The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The next portion of the statute is Section 5B which says that, "Whenever the Commission has reason to believe [fol. 152] that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act of practice in commerce and it shall appear to the Commission that a proceeding will be in the public interest, the Commission shall issue and serve a complaint."

There is a similar provision in Section 11 of the Clayton Act, 15 U.S. Code, Section 21, which is Section 11B, which says that, "Whenever the Commission shall have reason to believe that any person is violating or has violated any of the provisions of Section 7, it shall issue a complaint."

Now, our theory under the Clayton Act—I think I will take up our theory under the Clayton Act first, because to some extent our Section 5 theory is derivative of the Clayton Act and takes its content from the Clayton Act, because Section 5 is a very general statute.

Section 5, the Supreme Court has said, minimally registers all violations of the Sherman Act to the Clayton Act. That is the Times-Picayune opinion.

[fol. 153] A similar statement occurs in many other opinions, including Federal Trade Commission against Motion Picture Advertising Service in Volume 344 U.S., and I think it is at about page 395 that this statement occurs.

It is, therefore, recognized that the Federal Trade Com-

mission Act is a very general statute which sweeps up all other antitrust violations and has some additional ambit of its own.

I think in this case, however, we must take guidance from the policy of the Clayton Act in order to determine what it is that the Commission can find to be a Section 5 violation.

Now, under the Clayton Act this acquisition once consummated, assuming that the other elements of a violation are made out, clearly would fall within Section 7. Section 7 covers stock acquisitions, it covers assets acquisitions, it covers a number of other transactions.

I think the objection that has been made by respondent, or respondents, to which Judge Schnackenberg referred, is that the merger has not been fully consummated.

On December 13th, Dean and Bowman entered into a contract with one another. The contract is not to be carried out in full until Monday, that is, legal title to the property will not pass.

We think, however, that it is proper for the Commission to act by issuing its Section 7 complaint before it is, you might say, too late.

I think that the remedial purpose of this statute would be thwarted, if not defeated, if the Commission were powerless to act until a merger were completed, particularly in a case such as this when the very agreement for the merger provides for the immediate dissipation of something like half of the assets of the acquired company. I refer to the cash, the marketable securities, the working capital and the like.

I think we can take comfort from the very language of Section 11, the part of it that says, ". . . when the Commission has reason to believe that any person is violating the provisions of Section 7."

We think that Dean and Bowman are right now in the process of violating Section 7.

Judge Swygert: You think that the contract itself is a [fol. 155] type of violation?

Mr. Stern: Your Honor, my next contention will be that irrespective of our position under the Clayton Act, there is absolutely no doubt that the contract is swept up by the Federal Trade Commission Act, because the Federal Trade Commission Act will sweep up any contract, com-

bination or any other practice which would be an antitrust violation.

I think that an agreement or a combination between these two companies for one of them to be absorbed by the other does fit within the provisions of the Sherman Act which provides that any contract or combination in the form of a trust or otherwise or conspiracy in restraint of trade is declared unlawful.

Since the Federal Trade Commission Act includes everything in the Sherman Act, clearly a contract, a contract in restraint of trade, as we submit, that contract is a Section 5 Federal Trade Commission Act violation.

I would go further, your Honor, and say that the contract is also a Section 7 violation because I do not believe [fol. 156] that it can be said that the violation of Section 7 takes place at only one instant in time, the instant at which legal title to the property is transferred.

I think we may very properly regard a Section 7 violation as a continuing process that takes place over perhaps a short period of time, but not in one instant in time.

Judge Swygert: The same argument could be made on this question whether a complaint was filed by the Commission or by the Attorney General.

Mr. Stern: No, your Honor. I wish I could say "Yes," but the Department of Justice proceeds under a different empowering statute.

Our empowering statute says that when the Commission has reason to believe a person is violating or has violated Section 7, we proceed, whereas the Department of Justice has a much more vague and general statute that says they may prevent and restrain violations.

Nevertheless, I do not think, for the reasons I have given, that there is any significant difference between the jurisdiction of the Federal Trade Commission to issue its complaint and the power of the Antitrust Division to issue [fol. 157] its complaint, in similar circumstances.

I do not know whether I have satisfied the questions which your Honor may have on this point. If there are any other questions on the Commission's jurisdiction or the propriety of its acting at this point in time, I would like the opportunity to respond to those questions now.

Judge Schnackenberg: I do not think you have sufficiently responded as to the authority of the Commission

to come in at this time, before it has entered a cease and desist order, and ask this Court to enter an injunction. You recognize the point I am asking about, do you not?

Mr. Stern: Now, your Honor, I regret to say that I misunderstood the thrust of your Honor's question.

Judge Schnackenberg: You were so eloquent in your answer that I thought perhaps I did not understand what you were saying, but it seemed to me you were entirely beside the point. Now do you understand my question?

Mr. Stern: I do, your Honor, and I regret that I misunderstood it.

Judge Schnackenberg: If you do not have jurisdiction [fol. 158] or authority under law to be here today, we could dispose of all this work rather quickly. That is the matter I think you ought to talk about first. What right does the Commission have to be here? The Attorney General is not here, is he?

Mr. Stern: The Attorney General is not here, your Honor, but the——

Judge Schnackenberg: All right. You understand the point, what I want to hear you talk about.

Mr. Stern: I do, your Honor, and if I may, I would like to respond to the very last comment which you made.

We conferred with the Department of Justice before bringing this case and we discussed with them whether they should appear in this Court to argue to you or whether I should appear in this Court to argue to you.

Judge Schnackenberg: Anything that you and the Attorney General agreed upon would not change the law as to who has the right to be here.

Mr. Stern: It would not, your Honor, but you may regard it——

[fol. 159] Judge Schnackenberg: Have you a right to be here, under the law?

Mr. Stern: Your Honor, I think, with the greatest deference——

Judge Schnackenberg: Talk about that. Talk about that.

Mr. Stern: I will, your Honor. With the greatest respect, your Honor, I think the question is not our right to be here, but your right to act in the premises. The question is——

Judge Schnackenberg: Sensitive as that is, I think you should discuss that, too, but first we want to know whether

the Commission has any right to be here. Is that not correct?

Judge Swygert: That is the point. It is simply a question of standing of the Commission to come in here and ask this Court to invoke its jurisdiction.

You can put it the other way, whether this Court has jurisdiction to entertain a petition by the Commission for preliminary relief.

Mr. Stern: Well, there are several—I am not quite sure that I do fully understand the thrust of the question. Is it whether the right attorneys have come before this Court?

[fol. 160] Judge Schnackenberg: No. You represent the Commission, do you not?

Mr. Stern: I do, your Honor.

Judge Schnackenberg: All right. If you have read the petitions, briefs and motions filed here, you will understand what I am referring to.

The point is made that the Commission has no right to be in here in this proceeding, and authorities have been cited by the opposition to bear that out, and they claim that they fortify their position by citing the instances when the Commission has appeared before Congress on successive occasions and asked Congress to please pass a law so that the Commission has a right to go in and do what you are doing here today for the Commission, and Congress has failed to do so, session after session.

Have I made the position of the Court clear as to what it wants you to talk about?

Mr. Stern: Your Honor, the problem is one of characterization, obviously.

Judge Schnackenberg: No. It is not a matter of characterization. It is a matter of substance here.

[fol. 161] Mr. Stern: Your Honor, I think it can be said that even if we appeared here merely as a friend of the Court——

Judge Schnackenberg: You are not here as a friend of the Court.

Mr. Stern: Your Honor, we are here——

Judge Schnackenberg: The Court does not need any friends today.

Mr. Stern: Your Honor, you may not regard the Federal Trade Commission as a friend of this Court, but nevertheless, the capacity in which the Commission petitioned——

Judge Schnackenberg: We have not severed diplomatic relations, but you represent the Commission here today.

Mr. Stern: And I represent the Commission to ask the Court to issue a writ in aid of its own jurisdiction and to protect its own jurisdiction.

Judge Schnackenberg: All right. Now, where is the Commission's authority to send you in here for that purpose? I am serious about it.

Mr. Stern: Your Honor, there is no specific statutory authority——

Judge Schnackenberg: If you do not have that, that [fol. 163] ends this litigation.

Mr. Stern: Your Honor, there is no specific statutory authority that says the Commission may come to the Court of Appeals under the All Writs statute to ask the Court of Appeals to enter some kind of order in aid of the Court's appellate jurisdiction.

We rely, however, on Section 1651 of Title 28 which says that the Court has the power.

There is nothing in Section 1651, I believe, which states who it is who has standing to ask the Court to enter a writ in the circumstances, and there are many cases in which courts have entered writs of this type at the petition of agencies in order to preserve the status quo during the pendency of an administrative proceeding.

Transamerica, of course, is the case most closely in point, because it was a Section 7 case under the exact same statute and a very similar factual situation to the one at bar.

Judge Schnackenberg: That is a decision of what court?

Mr. Stern: That is a decision of the Court of Appeals for the Ninth Circuit in 1950. That is one of the two [fol. 163] conflicting opinions which the——

Judge Schnackenberg: That is a conflicting opinion?

Mr. Stern: The opinion of the Second Circuit is to the contrary.

Judge Schnackenberg: Well, now, you see, we have a real question here and that is why we want you to talk about it.

What is the law, then? If the court in San Francisco holds one way and the court in New York holds the other, we want to know what the law is, and we want the benefit of the aid you can give us by your argument here today, because obviously, the written motion in opposition by your

opponents reflects just the opposite view to that entertained by you.

Mr. Stern: I think I will not attempt to recapitulate the pre-1950 cases which we have in our main brief.

I think they are covered sufficiently, and I think it is enough to say in respect to those cases that the power of the Federal Courts to issue equitable writs in aid of their appellate jurisdiction has long been recognized.

[fol. 164] I think that the cases also show that it has long been recognized that such writs have been entered to aid appellate jurisdiction over administrative proceedings just as well as proceedings at law, and I think the proper point at which to begin is with the earlier of the two conflicting precedents, the Transamerica decision.

As the Court knows, the Court of Appeals is the exclusive review court for any final order which the Federal Trade Commission can enter here. Section 11C of the Clayton Act so provides.

It says:

> "Any person required by such order of the Commission to cease and desist from any such violation may obtain a review of such order in the Court of Appeals of the United States for any circuit within which such violation occurs or within which such person resides or carries on business. . . ."

It goes on to say what the method of review is and it concludes by saying that to the extent the order of the Commission is affirmed, the Court shall issue its own order commanding obedience to the terms of the order of the [fol. 165] commission or board, and the order of the commission at that point vanishes and the Court enters its own order which, from then on, is the only final order in the circumstances.

Judge Swygert: I hesitate to break in, and I know you want to talk about the Ninth Circuit case, but the respondents make the point that the jurisdiction of the Court of Appeals does not attach until, as the statute says, the petition for review has been filed—I am interpolating—at which time the Court shall have jurisdiction of the proceeding.

Now, up until the filing of the petition for review or

enforcement from the Federal Trade Commission, what authority does this Court have to do anyting until that time?

Mr. Stern: That is the precise——

Judge Swygert: Is that not the prime question here?

Mr. Stern: That was the precise question—first, that was the precise question at issue in Transamerica. There is no doubt that this Court has no appellate jurisdiction over a Federal Trade Commission order until it is a final Federal [fol. 166] Trade Commission order, that is, until the agency has concluded its administrative proceeding and, let us say, told the respondent to divest itself of the unlawfully acquired property.

The jurisdiction of this Court that we are concerned about is its potential appellate jurisdiction, and I believe that I can say with confidence that the cases recognize potential appellate jurisdiction as well as actual, present appellate jurisdiction as a ground for relief under Section 1651.

In fact, just about every mandamus case this Court has ever had has been in aid of its potential appellate jurisdiction, because there has been no final order. The whole purpose of mandamus, for example, is to prevent an egregious error from being committed in the lower court which will impair or in some way make defective this Court's exercise of its appellate jurisdiction over the final order entered in the case.

I think, therefore, that there is no way in which our position is weakened by the fact that this Court's jurisdiction to review the Commission's as yet unissued order, has not [fol. 167] yet attached.

We are asking this Court to issue a writ in aid of the jurisdiction which it will subsequently acquire at some later stage in this proceeding which, in fact, I must concede, may never happen, but nevertheless may very likely and is quite likely to happen and is sufficiently likely to happen that this Court has a proper interest in protecting that jurisdiction.

One of the leading cases in the Supreme Court is McClelland against Carland, which involved, as I recall, precisely this kind of situation.

In that case there was a mandamus to dissolve a stay. A lower court, I think it was a circuit court of the United States, had entered a stay of its own proceeding while a

collateral state proceeding went on. If the state proceeding were allowed to go to judgment first, it would act as a res adjudicata and that would mean that there would be no final judgment in the circuit court of the United States and therefore there would be no appellate jurisdiction that would ever attach in the circumstances, since it was in error [fol. 168] or since it appeared that it might well be in error to have the circuit court enter a stay in such circumstances, and the Supreme Court said that a show-cause order should be issued to the circuit court to show why it should not dissolve its stay. I think there is no doubt whatsover——

Judge Schnackenberg: In that case was there a petition for mandamus pending in the Circuit Court of Appeals?

Mr. Stern: Your Honor, that was under the old system, where we had the circuit courts, not the Circuit Courts of Appeals, but that was a case which would go, as I recall, directly from the circuit court to the Supreme Court. This was a pre-1911 situation.

Judge Schnackenberg: You did not have there a court of review, then, did you?

Mr. Stern: The Supreme Court was the court of review for the circuit court. The circuit court was the trial court in that case.

Judge Schnackenberg: You did not have a Court of Appeals in that situation, did you?

Mr. Stern: You had the Supreme Court, your Honor, [fol. 169] and the precise same statute was involved, Section 1651.

Judge Schnackenberg: Did the Supreme Court have a petition for mandamus before it?

Mr. Stern: Yes. That was the posture of the case.

Judge Schnackenberg: In this case we have nothing before us here.

Mr. Stern: You have the petition.

Judge Schnackenberg: What is the excuse for coming in here?

Mr. Stern: Your Honor, you have before you precisely what the Supreme Court had before it, a petition for a writ under the all writs statute.

Judge Schnackenberg: You say they had a petition for mandamus before them?

Mr. Stern: Your Honor, mandamus is one of the prerogative writs.

Judge Schnackenberg: Yes. I know that. We have those here frequently. In aid of our jurisdiction in such proceedings we have certain powers, as you say, but at this moment, when you came in with this petition, or whatever your pleading is called here, your request for an injunction, [fol. 170] up to that time we had nothing about this case in this court, is that not true?

Mr. Stern: Yes, your Honor, that is true, and——

Judge Schnackenberg: Now, in spite of the fact that you needed some help and Congress would never give to the Commission any authority to file proceedings of this kind, you come in here and ask this court to intercede without any precedents to support you except in one case in the—what was that, the Tenth Circuit or the Ninth Circuit?

Mr. Stern: That was the Ninth Circuit, your Honor.

Judge Schnackenberg: The Ninth Circuit.

Mr. Stern: Yes.

Judge Schnackenberg: The only other case on the subject is the Second Circuit case, the Second Circuit being in New York City, which is a very prominent place in this country, and they disagreed with the San Francisco court, is that not correct?

Mr. Stern: They did, your Honor. They made no attempt to distinguish the opinion. They said flatly, "It is wrong. We disagree with our brethren of the Ninth Circuit. [fol. 171] They have a mistaken view of the law."

Judge Schnackenberg: Is there anything in the wording of the law, the Act which creates the Federal Trade Comission, which expressly grants power for this proceeding?

Mr. Stern: Your Honor, there is no specific statutory authority except the general authority that all persons have to come before the courts of the United States for prerogative writs.

Judge Schnackenberg: Does it say that in the Federal Trade Commission Act, what you have just quoted?

Mr. Stern: There is no specific statutory authority, your Honor.

Judge Schnackenberg: However, the Federal Trade Commission Act does have provisions for coming to a Court of Appeals in certain situations. It says so, does it not?

Mr. Stern: The very section——

Judge Schnackenberg: Do you agree with me on that?

Mr. Stern: The very section which I was quoting before, yes, your Honor.

[fol. 172] Judge Schnackenberg: And those are cases where somebody is aggrieved by an order entered by the Commission and desires a petition for review in this court, is that not true?

Mr. Stern: Yes, your Honor. That is correct. That is correct. If I may——

Judge Schnackenberg: In other words, Congress did not grant the extension of powers which you are asking this Court to grant today, did it?

Mr. Stern: Congress has not spoken on the subject.

Judge Schnackenberg: Has it been asked to at several sessions?

Mr. Stern: Your Honor, I must admit that the Commission has, on a number of occasions, requested Congress to pass statutes that relate to this.

The Court: If you are right in your contention and we have the power anyway, why did the Commission go to Congress several times to get a law passed authorizing the proceedings?

Mr. Stern: The only thing I can say to your Honor is that the Commission acted either out of an excess of caution or it was not properly advised.

[fol. 173] It is now the position of the Commission that this Court has the power to act as the Commission has asked Congress to act.

Judge Schnackenberg: You may be right, but it certainly is a change in the policy of the Commission, is it not?

Mr. Stern: Your Honor, we had the precise same thing with Section 7 of the Clayton Act.

Judge Schnackenberg: Is that not true?

Mr. Stern: You are absolutely right. I cannot disagree one iota with you, your Honor.

Judge Schnackenberg: Then say so.

Mr. Stern: You are absolutely correct.

Judge Schnackenberg: All right. You may be right. Go ahead.

Mr. Stern: We had the same situation with respect to Section 7 of the Clayton Act. The Federal Trade Commission——

Judge Schnackenberg: You are watching your time, are you?

Mr. Stern: The Federal Trade Commission——

Judge Schnackenberg: I do not want you to forget anything by a shortage of time. You have used twenty-nine minutes, so keep that in mind.

[fol. 174] Mr. Stern: Thank you, your Honor.

Judge Schnackenberg: Go ahead.

Mr. Stern: The Federal Trade Commission repeatedly asked Congress to amend Section 7 for it to cover vertical integration. Over a period of years it kept telling Congress that Section 7 would not reach vertical acquisitions.

Finally, Congress passed a statute. In the meantime, however, a case under old Section 7 came to the Supreme Court and the Supreme Court said that the Commission had just misread the statute for the past forty years, or however many years it had been, that the Commission and the courts had always had the power to move against vertical integration under Section 7 of the Clayton Act, and the Supreme Court discusses this in the du Pont opinion.

It said, "Yes, we know the Commission asked for this, we know they said they did not have the power, but they were wrong. We know how to interpret the statute and the Commission does not."

I submit to you, your Honor, that you are in the same posture as the Supreme Court in this respect and we [fol. 175] request that you interpret the statute as we urge it, despite the fact that the Commission has told Congress the contrary on some occasions.

I might add that most of the statutes involved have been a request that the agency itself should be permitted to enter a temporary cease and desist order. This is not the case with respect to all of the bills that were proposed, but with respect to most of them, it was the case where the Commission did not want to go to Court, but wanted to issue its own injunction.

I think your Honor will see that Congress may have had reasons for not wanting to accede to that request of the Commission.

The Transamerica case does not stand alone. As your Honor said before, the Transamerica and International Paper cases are the only cases that there are on this point.

Transamerica in the last two or three years twice has been cited by the Supreme Court in a context which I think is relevant here. The first case is the Arrow Transportation case, which is discussed in our main brief at page 30.

[fol. 176] That was the case in which the Interstate Commerce Commission had instituted a rate investigation of certain railroad tariffs. The Commission had the power to stay the rate for seven months, but no more.

The reason that it had a seven-months power was that there had been considerable dispute in Congress as to what should be done about the stays. Shippers wanted longer than seven months and carriers wanted shorter stays or no stays at all. As a compromise Congress authorized the Interstate Commerce Commission to make seven-month stays of rate proceedings.

The Supreme Court held that in the circumstances, the All Writs statute could not be used to defeat the clear intent of Congress to have a seven-months stay and to have the matter handled by the Commission and not by the Courts, but in holding this, the Court expressly stated in the passage which we quote on page 31:

> "We in no way reflect on all writs cases, such as Transamerica. We in no way reflect upon decisions which have recognized a limited judicial power to pre-[fol. 177] serve the court's jurisdiction or maintain the status quo by injunction."

I think the Transamerica case is, at the very least, approved by the Supreme Court in its Arrow opinion. I think it shows that Transamerica is regarded as a valid and proper precedent.

There is another case recently, the Whitney Bank case, in which the Supreme Court referred to——

Judge Schnackenberg: What is the name of the case?

Mr. Stern: The name of the case is Whitney National Bank against Bank of New Orleans, 379 U.S. 411. The other case to which I referred was Arrow Transportation Company against Southern Railroad, 372 U.S. 658.

Whitney was a case involving a stay of agency action. The agency was going to permit a bank to go into business in competition with a complaining bank who filed a petition and sought some sort of relief to prevent the agency from allowing a competitive bank to go into competition with it.

The court said that in the circumstances it was proper [fol. 178] for the Court of Appeals to issue a temporary

injunction under the All Writs act against the agency and against the people involved so that the question would not be in any way mooted or the subsequent appellate jurisdiction of the Court of Appeals to review the banking agency's action would not be impaired in any way.

Judge Swygert: Was this an agency—excuse me for interrupting.

Mr. Stern: That is all right, your Honor.

Judge Swygert: Was this an agency request?

Mr. Stern: The agency was on the receiving end in this case. The agency was being enjoined from proceeding.

Judge Swygert: By a private party?

Mr. Stern: I have not put that precisely correctly. Originally one party tried a straight equity action against the other party and the Controller of Currency. It got up to the Supreme Court in the regular way and they said, "No, you have picked the wrong route. The proper route is for you to have sought the All Writs route," so the Court did not have the case before it in the precise form in which I have put it.

[fol. 179] What it said was, "Go sue the agency under the All Writs act," but I think for our purposes, your Honor, it is just the same as if they had sued the agency and the Supreme Court had said, "Yes, that is the right thing for you to do."

I think that both of these cases show that Transamerica is a valid precedent of continuing vitality and represents the better view as recognized by the Supreme Court.

The International Paper opinion, which is the case against us, takes the position that there is to be implied from the existence of Sections 15 and 16 of the Clayton Act, which say that private parties and the Antitrust Division can go into district courts to get injunctions, they say that there should be implied from this a conscious withholding of judicial power of the sort we are asking this court to exercise, judicial power under the All Writs act.

There is nothing in the legislative history of the Clayton Act which supports the interpretation of the Second Circuit that Congress consciously withheld and repealed the [fol. 180] historic self-protective powers of the Federal Courts under the All Writs act.

In fact, if anything should be inferred from the legislative history, it would be the contrary, because Congress

said repeatedly in the debates and in the reports on the Clayton Act that they wanted to catch restraints of trade in their incipiency, they wanted to catch monopoly in its incipiency, they did not want to wait until merger after merger brought some particular industry to a state of monopoly or near-monopoly.

To say that Congress wanted to have an incipency statute, a statute which would catch restraints of trade in their incipiency, and at the same time say, "Wait until it is too late. Courts, don't do anything. Wait until after it is too late to enter any relief before you can act," just does not make sense, we submit.

Judge Swygert: Do you see any difference between this Section 7 proceeding and a proceeding under Section 5, where you can come into the Court of Appeals and get relief before investigating an alleged unfair practice violation?

Mr. Stern: Is the thrust of your Honor's question——
[fol. 181] Judge Swygert: I mean, an alleged violation under Section 5.

Mr. Stern: I think the answer is no, but if I may, I wish to—the answer is no, we cannot do that, I think, but I want to make sure that I understand the question.

Judge Swygert: Well, are you asking that this kind of relief be confined to Section 7?

Mr. Stern: I am not asking that it should be confined to Section 7, but I must say that how it can be applied to any other violation of the antitrust laws, at least at the moment, escapes me.

We have to show, I believe, in order to prevail under the All Writs act, several things. We have to show that there is going to be some kind of irreparable public harm in the sense that we will not be able to restore the status quo, or to put it differently, that the court will not be able to enter an order restoring the status quo.

Now, you do not have destruction of assets or destruction of companies in deceptive practices cases. At least, [fol. 182] I have never heard of such a thing. As a general rule, you do not have it in anything except a Section 7 case.

I suppose there might be an extraordinary case where this would be so and perhaps that would be an appropriate case, but I cannot imagine such a case.

The second problem is that we would have to show a likelihood of success on the merits. I do not think that we can come in here without some showing of probable success on the merits.

Now, the law of Section 7, at least in horizontal mergers, has been very well articulated by the Supreme Court in the last few years. It is possible at this time, now, to say that there is such a thing as a Section 7 prima facie case.

Philadelphia Bank says what is one kind of prima facie case. That was 30 per cent horizontal. Just last term or the term before, in Continental Can the Supreme Court whittled the percentage down to 25 per cent, saying that there is a prima facie case of violation when you have a horizontal merger covering 25 per cent of the market. [fol. 183] Now, how we could make out a prima facie case in a deceptive practices situation, I cannot at the moment imagine. I do not think that we are prepared to unleash or that we are asking the Court to open flood gates of litigation upon itself.

Not only would the Federal Trade Commission exercise rational self-restraint, but I cannot imagine that there is any substantial class of cases, perhaps beyond horizontal merger cases, but certainly beyond Section 7 cases, in which this is likely to happen. Does that answer your Honor's question?

Judge Swygert: Yes.

Mr. Stern: If I may, I would like to return to the International Paper decision. The Second Circuit, as I said, in some manner reasoned that there was an implied repeal of judicial power. The Supreme Court has said in these circumstances that the presumption is the other way.

In the Scripps-Howard case, on which I think we can rely heavily, 316 U.S. page 4, Scripps-Howard against the [fol. 184] FCC, that was a case in which the FCC was going to issue a license to the competitor of the person who brought the case. He did not want this competitor to go into business against him pending administrative review.

He went to the Court of Appeals and said, "Would you issue a stay order under your powers, your equitable powers, to prevent the Commission's order from becoming effective and my competitor from going into business against me?"

The Court said, "We have no power to do that. We can't do it."

The Supreme Court said this is absolutely wrong. They said:

> "There is a presumption that courts have this power, this staying power to preserve the status quo, and if Congress wants to take the power away from the courts it should say so with apt words."

This particular discussion is at page 17.

Judge Schnackenberg: That is in the Scripps-Howard case?

[fol. 185] Mr. Stern: That is in the Scripps-Howard case. There is certainly no use of apt words here. There is no use of words at all. The entire repeal is an implied repeal and we are dealing in an area of law where repeals by implication have repeatedly been held by the Supreme Court to be disfavored.

Most recently, in the Philadelphia Bank case, the Supreme Court said, "Repeals by implication in antitrust cases are highly disfavored," citing a very long string of cases to this effect.

I think those are the points which I wish to cover on jurisdiction. I have not recited what happened in Transamerica. I have not recited the facts of that case, but I believe the Court is sufficiently familiar with it from our discussion of that matter.

Judge Swygert: I would like to ask a couple of questions [fol. 186] that were not in the briefs. Does the filing of the petition by the Federal Trade Commission mean that the Department of Justice will not take jurisdiction under these circumstances?

Mr. Stern: No. What happened in this case was—I will be glad to furnish it to the Court. We have a letter from the Attorney General directing us to go ahead and do this.

We first went to the Attorney General and said, "Would you like to come in here and argue this case for us?"?

Judge Swygert: I am not talking about arguing the case. I am talking about bringing the action.

Mr. Stern: You mean, turn the case over in its entirety to the Department of Justice?

Judge Swygert: Yes.

Mr. Stern: If your Honor please ——

Judge Swygert: In other words, once you take jurisdiction, does the Department of Justice withhold its hand?

Mr. Stern: Yes. There is long-standing arrangement [fol. 187] between the Department of Justice and the Federal Trade Commission in merger cases particularly, but in other cases as well, namely, that there are certain areas which one agency will handle and certain areas which the other will handle.

For example, milk is considered to be the particular expertise of the Federal Trade Commission because it has entered so many milk merger orders, it has had so many milk proceedings.

By the same token, heavy machinery cases are customarily brought by the Anti-Trust Division, and oil cases. A cement case or a department store case would be brought by the Federal Trade Commission.

We have an informal arrangement whereby we have allocated markets to one another, you might say.

Judge Schnackenberg: Who handles baseball?

Mr. Stern: I would like to know. We do not. I know that we do not. They handle baseball chewing gum picture cards.

Judge Schnackenberg: Do you want to save any time for rebuttal?

Mr. Stern: I will save——

[fol. 188] Judge Schnackenberg: I would like to get the last word with you.

Mr. Stern: I would like to have the last word, your Honor, and if I may, I would cover only one more point and then sit down.

Judge Schnackenberg: Very well. Go ahead.

Mr. Stern: Now, the one more point I want to cover is the contention which respondents have made in their answering brief at pages 19 through 22. This is on the failing company defense, the doctrine of the International Shoe case.

They make the contention that there is no requirement under this doctrine that the acquired company have no available alternative purchaser. They say it is merely—I do not think they even believe that the company has to be failing. I think they believe that it has to be merely in distressed circumstances, but we have briefed that adequately in our main brief.

They would go further and say that it need not be established by the defendant that he sold out to a company, which was the only company which would buy him. Now, [fol. 189] this is argued with great earnestness.

It is our position that this is absolutely contrary to the ruling of the Supreme Court in the International Shoe case. Respondents cite a number of cases. They cite Beegle against Thomson in this court, for example, which is a long case and which deals with many other points, and then very close to the end mentions in passing that, "It is also the case that when a failing company is acquired, this does not violate Section 7 of the Clayton Act."

There is no reason to believe that the question was in any way presented to the 7th Circuit at that time that there must or must not be an available alternative purchaser. I do not think this Circuit should regard itself as committed to that view, because of Beegle against Thomson.

I think this should be particularly the case, because in all the cases cited by respondent, which I think in general are fairly peripheral, they are cases on temporary injunc- [fol. 190] tion, one of them is under another statute, under Section 408 of the Federal Aviation Act, which says that you should not have mergers which will actually create a monopoly, and the very case cited says that the statute deals not with an acquisition which may substantially lessen competition or may tend to create a monopoly, but one which actually creates a monopoly.

In that case the CAB said, "We don't need to talk about International Shoe"—or rather, the Court of Appeals in reviewing the CAB said, "We need not talk about International Shoe."

That is quite right, but that statute has nothing to do with Section 7 of the Clayton Act.

The one case in this long list of cases which is omitted is the only Supreme Court case on failing company since International Shoe.

I do not know why it is omitted, but I would like to draw to the attention of the Court the Supreme Court's language in that decision, which I think compels the conclusion that there must be no available alternative purchaser for [fol. 191] the defense to be applicable.

United States against Diebold, Incorporated, is in 369 U.S.

Judge Schnackenberg: U.S. versus what?

Mr. Stern: Diebold, D-i-e-b-o-l-d, 369 U.S., 654, your Honor. The passage to which I refer is at page 655, your Honor. It is a very short per curim opinion, your Honor.

This was a case in which summary judgment on failing company had been granted against the government and the government appealed to the Supreme Court. The Supreme Court said:

> "In determining that the acquisition ..... was not a violation of Section 7, the District Court acted upon its findings that 'HHM was hopelessly insolvent and faced with imminent receivership' and that 'Diebold was the only bonafide prospective purchaser for HHM's business.' The latter finding", meaning the only available purchaser, "represents at least in part the resolution of a head-on factual controversy as revealed by [fol. 192] the materials before the District Court of whether other offers for HHM's assets or business were actually made. . . . . On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of International Shoe Company v. Federal Trade Commission, it was improper for the District Court . . . . .", to grant summary judgment.

In other words, the Supreme Court sent the case back to the District Court for an evidentiary trial on whether there was another available purchaser. Now, surely the Supreme Court could not have sent this case back for trial on the [fol. 193] issue if it is not one of the elements of the defense.

I will reserve my remaining time, your Honor.

Judge Swygert: I have one further question, although I do not know whether you are prepared to answer it or not. Assuming you filed your complaint, how long would you say it would take to reach the point where the Commission would finally issue an order one way or another in this case?

Mr. Stern: I am very glad you asked that question, your Honor, because I asked the Chairman of the Federal Trade Commission what I should say to you if you asked that question, because I did not want to answer that on my own responsibility.

The Chairman told me to explain to you how our procedure for the trial of this case worked. We have already issued the complaint and a hearing date has been set. This hearing date is set up in the complaint itself, which you have as Appendix A to our petition. It is some time next month.

[fol. 194] Under our procedure, we give the respondent a reasonable amount of time to prepare its defense. We will give Dean and Bowman as much time within reason as they need to adequately prepare to go to trial. We are already prepared to go to trial.

It is my opinion that it will take us, to try the case, at most, two weeks. Let us assume that it takes them another two weeks or three weeks. It cannot possibly take more than six weeks to try the whole case. I suppose we should allow some time for pre-trial also.

The examiner under our rules may take as long as 90 days to write his opinion, or longer, at least without a special order from the Commission so permitting.

The case would then go to the Commission. They would be allowed 60 days to prepare their appeal brief to the Commission after the examiner enters an order, assuming it is an order adverse to them.

Then as complaint counsel, I would prepare our answering brief. I would be given, I believe, 30 days and they could prepare a reply brief if they wanted, and we would [fol. 195] then argue the case and the Commission would decide it.

The chairman said that we should represent to you that we stand ready, if the Court will enter an order in the premises, every three months to come back to the Court and make a progress report on how fast are proceeding and whether there has been any delay, and if you find that the Commission is dragging its feet in any way, you could then take our order away from us. He said he thought we could have this case back before you within a year.

Judge Swygert: One other question. What about anything less than an injunction, that is, an asset separation

or some other kind of order other than just a blanket stay of the execution of the contract?

Mr. Stern: We have obliquely urged that upon the Court repeatedly in our papers, as I am sure you are aware from your question.

Indeed, I think the Court would be aware of that from the very caption of our petition. I am prepared to say that the Commission desires to see the Court protect the [fol. 196] status quo in aid of the Court's jurisdiction. If this status quo can be adequately protected by a protective order, and I think that it could, the Commission ——

Judge Swygert: Short of what you are asking?

Mr. Stern: Yes.

Judge Swygert: Short of a blanket injunction?

Mr. Stern: Yes. In fact, there are a number of such orders, a number of ways to draft such an order. In the Northern District of Indiana, for example, a very well drawn protective order was recent entered. It is a fairly complex order.

For a much simpler order, you can take, if I may be specific, your Honor, our Exhibit H, I think it is, our proposed temporary injunction, and just strike out of it the language on page 6 of Exhibit G, our proposed preliminary injunction, just strike out of it that phrase which enjoins them so that it reads, "respondents Dean and Bowman are enjoined from . . . ", and then strike out these words, [fol. 197] "taking any further steps to consummate the purchase agreement", strike that out and just enjoin them from making any changes directly or indirectly with respect to the stock, corporate structure, business, and I suppose the word "assets" should be included so that they would not dissipate the company's assets, and I think that would be a perfectly effective protective order in the premises.

I think it might be well, if the Court is minded to do this, to direct that the parties negotiate such an order, and I will be ready to negotiate such an order at any time with counsel for respondents.

Thank you, your Honors.

Judge Schnackenberg: We have two speakers for the respondents, Mr. Chaffetz and Mr. Stevens.

Mr. Chaffetz: I will take most of the time, your Honor, and Mr. Stevens may wish to add something. I will endeavor to speak for both respondents.

Judge Schnackenberg: All right. You may proceed.

[fol. 198] ARGUMENT ON BEHALF OF RESPONDENTS
BY MR. CHAFFETZ

Mr. Chaffetz: May it please your Honors: if there is anything that is certain here today, it is that there will be no Federal Trade Commission hearings. This transaction cannot survive the hearing today. If it is stayed, that is the end of the transaction.

Judge Swygert: I am sorry to interrupt, but would that be true even under a less stringent order?

Mr. Chaffetz: Yes, your Honor, and I am going to tell why.

Judge Swygert: I see.

Mr. Chaffetz: I am going to tell why. This, to all intents and purposes is the final hearing, because if the transaction is stayed, Dean will be compelled to withdraw, as it has the right to do under the contract. The contract so specifically provides.

This is not a matter of putting any pressure on the Commission, and certainly not on the Court. This is a question of the realities of a situation here, and I am going to dwell on that at some length. I want to tell this court what——

[fol. 199] Judge Schnackenberg: You represent Dean?

Mr. Chaffetz: Dean Foods, yes, sir, and as I say, I shall speak for both companies, but I want you to know at the beginning that that is what I am going to talk about. I am going to explain to you why this is the final hearing.

Secondly, I am going to suggest to your Honors, that even though I think there is utterly no jurisdiction here, I think there is no question about it, I suggest to your Honors that you do not have to wrestle with this legal question in any event.

This is an appeal to the discretion of the court, and what I say is that even if there is doubt about the jurisdiction and it is not as clear as I think it is, under the facts of this case, under the facts of this case, considering the consequences to the parties and considering the fact that an adverse ruling by this court will preclude the transaction finally, as though it were a final hearing, even though only an affidavits, under those circumstances, I am going to say that the Court should exercise its discretion [fol. 200] to deny the relief without finally passing on the legal questions that are presented, particularly since, as

I am going to urge, the denial of relief here may very well be in the public interest, not only the parties here, but others in the industry may be better off if this relief is denied, and I am going to talk about the witnesses whose affidavits we have gotten in the last few days, who support that conclusion.

Let me say that we filed a joint brief for the two companies and a number of affidavits. We have affidavits not only from the parties in interest but also from others in the industry, leaders of the industry, the Milk Association, the co-ops, the Dealers' Association, stating that they would not want to interfere with this transaction and that this transaction will hurt nobody in the industry.

I think it is only fair to say, and I think the Court will assume, that the Commission has exhausted its efforts to get similar affidavits and they came up with only one, which I will talk about later.

[fol. 201] As far as the industry is concerned, before this court today, there is no harm to anybody from this transaction, and the harm to the respondents, both of them, if this injunction would be granted, is utterly irreparable and that is, as I say, what I am going to talk about.

Judge Swygert: I appreciate the fact that you are going to talk about that and it is of prime importance, but if we deny it on that basis, then we assume jurisdiction, and how can we assume jurisdiction denying or granting unless we have that jurisdiction?

Mr. Chaffetz: I would think, your Honor, if there is a doubt as to jurisdiction, then in exercising your discretion, you would decline to entertain application for injunction. It is purely discretionary, as the Commission itself says.

Judge Swygert: We either have or do not have jurisdiction.

Mr. Chaffetz: Yes. I think the doubt as to jurisdiction might be a very good ground for refusing to entertain the petition, or go into the merits of it.

[fol. 202] Judge Swygert: Or go into the merits.

Mr. Chaffetz. Or go into the merits. That is right.

[fol. 203] But as I say, I am going to argue the merits, because I think my strongest case is on the merits, even though I think the law is also clear on my side. We have a strong case. I want to tell you about that. First I want to—

Judge Schnackenberg: You are not going to argue whether we have jurisdiction?

Mr. Chaffetz: I am going to argue both, yes, your Honor.

Judge Schnackenberg: If we do not have jurisdiction, you can write your other argument and mail it in.

Mr. Chaffetz: I do not believe you have jurisdiction. In that connection, your Honor, may I interrupt myself to trouble you to note a couple of citations which turned up after we had filed our briefs, which bear on this subject of jurisdiction, incidentally.

In the Philadelphia Bank case, 374 U.S. 321, at page 339, there is a note 17 which, curiously enough, cites both the International Paper case and the Transamerica case, the two cases which counsel says are in conflict on the question of this Court's jurisdiction.

[fol. 204] If your Honors should read that note the way I did, you may conclude that the Supreme Court, Mr. Justice Brennan writing the opinion in that case, believes that both cases may stand up, but the circumstances are different—we suggest the distinction in our brief—and the decision in the Second Circuit, which is precisely on all fours with ours here, is cited in that note in that case.

I also would like to invite your Honor's attention to this citation, Section 1, 73 Stat., 243, Federal Statutes.

Judge Schnackenberg: 73 Stat.?

Mr. Chaffetz: 73 Stat. 243.

Judge Schnackenberg: Yes.

Mr. Chaffetz: The significance of that citation is this: This was an amendment to the Clayton Act, Section 11. This has not been mentioned in the Commission's brief, and I am frank to say that I did not know about this until this noontime.

I was curious about the language in that section and I went back to see what the history of the language was. It [fol. 205] develops that in 1959 Congress amended Section 11C, the statute that is before your Honors today, so that it now reads:

> "Upon such filing of the petition", filing the petition for review in this court, "the Court shall have jurisdiction of the proceeding and the questions determined therein concurrently with the commission or board until the filing of the record and shall have the power to make and enter a decree affirming, modifying or setting

aside the order of the commission or board", and this was the amending language, this language was added, and I quote, "and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

Now, this was a specific amendment by Congress in 1959 which gave the limited jurisdiction to this Court in these premises, and the sentence begins, "Upon such filing of the [fol. 206] petition", the court shall have this jurisdiction.

Judge Swygert: With respect to that section, the history of it, I thought that the history of it was that up until that time the Commission had to start almost a new proceeding, and now it does not.

Mr. Chaffetz: That is true, but while amending the statute for the purpose your Honor indicated—I am sorry to have interrupted you.

Judge Swygert: That is all right.

Mr. Chaffetz: While amending the statute for the purpose your Honor indicated, they added authority in the court to grant equitable relief only after jurisdiction has attached in this Court, only after the filing of the record.

It seems to me that what Congress says is that after the filing of the record, this Court shall have the authority to grant the kind of relief that is sought here.

This statute was only enacted in 1959. It is hard to believe that the Court had much broader jurisdiction than that to begin with.

While I am asking you to make notes, your Honors, [fol. 207] there is an unfortunate typographical error in our brief on page 40, at the bottom of the page. There should have been a negative in the last sentence on that page. The sentence should read:

> "Provisions involved there granted no authority to private parties."

The word "no" should be added after the word "granted" in the third to the last line, in the foot note on page 40 of our brief.

Judge Schnackenberg: The third line from the bottom?

Mr. Chaffetz: Yes. It should read "granted no authority." The word "no" should be added.

Judge Schnackenberg: Very well.

Mr. Chaffetz: I want to bring out one other matter, if your Honors please. There has been no effort here, I want to be sure your Honors understand, for us to make an end-run play around the Commission

This did not just come to the Commission's attention at the last moment when the agreement was signed. The fact of the matter is that we brought this transaction to the attention of the Commission before there was an agree-
[fol. 208] ment. From the moment there was a shake of the hands and an expectation that there would be an agreement, but no assurance that there would be, in order to give the Commission a full opportunity to——

Judge Schnackenberg: Is this in the record before us?

Mr. Craffetz: No, but it is not disputed I am sure, your Honor. Counsel, I am sure, will affirm this.

Judge Schnackenberg: Well, we do not have any way of finding out if it is disputed. I think you should stay on the record.

Mr. Chaffetz: Very well, your Honor. I was afraid, and I did not think of this, this did not occur to me until I read the papers here, that in this posture it might look as though a preliminary injuncton was asked for the moment that the Commission heard about the transaction.

I think it is only fair to point out, and I am sure that the Commission would not object, that this has been before them since the 2nd of November. That is all I intend to say.

Judge Schnackenberg: Well, you should not go outside of the record.

[fol. 209] Mr. Chaffetz: All right. I am sorry. This is an unusual proceeding. I would not do this, your Honor, if a record had been made.

Judge Schnackenberg: It is not unusual in this Court that no lawyer should go outside of the record.

Mr. Chaffetz: I am sorry. In an application for temporary injunction—

Judge Schnackenberg: We have to treat them all the same in this Court.

Mr. Chaffetz: This is the type of preceeding that comes up suddenly and no record is made. There is no record.

Judge Schnackenberg: You still cannot go outside of the record.

Mr. Chaffetz: May I ask your Honor's permission to submit an additional affidavit supplementing the record with these facts? I think they may be of some significance to your Honors.

Judge Schnackenberg: Has the Commission any objection to the statement of counsel, which I believe was outside of the record?

Mr. Stern: Your Honor, I think we will submit an affidavit controverting that statement.

[fol. 210] Mr. Chaffetz: Do I understand that the Commission will submit a——

Judge Schnackenberg: Just a minute. What did you say?

Mr. Stern: I think, your Honor, that we may submit an affidavit to some degree controverting that statement.

Judge Schnackenberg: We will have to have a full-blown trial here to find out who is telling the truth with respect to this.

Mr. Chaffetz: All I know is, your Honor, that I was there on November 2nd in Washington, and I can make my own affidavit.

Judge Schnackenberg: I do not think we had better get off on any collateral trials. This is a problem by itself here.

Mr. Chaffetz: I will confine myself to the facts, your Honor. Let me come to the facts.

Judge Swygert: The case certainly does not turn on that, does it?

Mr. Chaffetz: No. I just did not want the Court to have the impression that the Commission did not have a full opportunity to investigate this matter and learn the facts.

[fol. 211] That is all I had in mind.

Now, let me come to the facts. I would like this to be determined upon the facts, because I think they are clear. I think they are clear.

The thing that puzzles me about the Commission's presentation is the utter unreality of their whole statement and analysis of the facts in their economic affidavits. They postulate a case where two giants, competing with each other, strong, viable competitiors, will continue to compete, will continue to go along, if this transaction is set aside, and their argument on the law relates to that kind of a

transaction. Is the percentage of 23 per cent almost as good as 29 per cent, which the Supreme Court said is enough to constitute a violation of Section 7?

That is not this case at all. Let me talk first about Dean and then about Bowman. I am going to talk primarily about Chicago because the Commission concentrates on Chicago. This case turns, I think, on the situation in Chicago, so for simplicity, I will confine myself to Chicago. [fol. 212] Dean Foods is said to have around 7 per cent of the market here in Chicago. If you analyze that, you will find that most of Dean's business in Chicago is with one customer, the Jewel Tea Company. Dean has never been a traditional household supplier of milk. It never had any retail routes.

It came into the market as a wholesale supplier and principally to supply Jewel Tea. Some time ago, according to the affidavits, Jewel Tea apprised Dean that they were thinking of doing their own milk business and they wanted Dean to be put on notice that they could not depend upon this busines for the future.

The consequences of this to Dean are not merely the loss of the bulk of their business in Chicago, but the effect upon the Dean plants which are big plants which supply milk not only to Jewel in Chicago but to the surrounding area. If this volume were taken out of those plants, it would be little short of disastrous to the ability of those plants to continue to operate profitably.

This, according to the affidavits in this case, is what motivated Dean to be interested in this very difficult transaction. Dean is committing itself here on the day they signed [fol. 213] this agreement, to an obligation in money terms almost equivalent to their whole net worth.

Their net worth is about $15,000,000 and they had to commit themselves to about $12,000,000 to close this transaction. They would not do it in the light of what I have just said, and also in the light of the nature of Bowman's business which they are taking on, and which they are taking on only because they have a problem somewhat desperate, and this is a desperate way, hopefully, of solving that problem, providing only, and this is very important, providing only that the transaction can be concluded and Dean be afforded maximum flexibility to deal with the situation before the Bowman situation deteriorates any further. That is where the urgency is.

If Dean has to stand by after this publicity of these hearings and all the facts are out, there is no telling what Bowman's business will be a week from now if their principal customers should desert them in the light of what has now been made known.

[fol. 214] We made every effort, I should say, to keep this entirely secret until we came to this Court.

Judge Schnackenberg: Nothing is secret up here.

Mr. Chaffetz: I say, we made every effort to keep this entirely secret until we came to this Court.

Judge Swygert: The Federal Trade Commission argues that if there is not some kind of a restraining order or injunction and the contract is executed, divestiture or any remedial relief is practically impossible.

On the other hand, you say that if the deal does not go through now, you will withdraw—that is what you have said, I think, in effect—and it will become economically unfeasible ——

Mr. Chaffetz: That is right.

Judge Swygert: ——to prolong it.

Mr. Chaffetz: That is right.

Judge Swygert: Is there not a middle ground here?

Mr. Chaffetz: I wish there were, your Honor. Take the Bowman situation. I want to come to that now.

[fol. 215] They talk about a stay order to maintain the status quo. Bowman is losing $25,000 a week here in Chicago alone, every week, in their retail milk delivery routes. That loss may be much increased tomorrow when word of these proceedings gets out. They may lose more business.

They have lost $9,000,000 worth of sales in the last five years. They lost a million and a half dollars in Chicago just in 1964. They spent a million dollars to rehabilitate their Chicago plant, and the following year they still expect to lose, for the year 1965, close to a million dollars.

I think it is not realistic to talk about maintaining the status quo. Now, let me come to the most important thing, which is ——

Judge Swygert: Not maintain the status quo, but couldn't you operate Bowman under some sort of an arrangement ——

Mr. Chaffetz: At whose risk?

Judge Swygert: (Continuing) —until this hearing is finished, without wiping it out of existence?

Mr. Chaffetz: At whose risk? Who is going to stand the [fol. 216] loss? Are we going to pay $12,000,000 and agree to keep them going and lose the money?

On the other hand, your Honor, and this is what I have not gotten to yet, the fact of the matter is that Bowman has already decided to liquidate if they do not make this deal.

In the reply brief that was filed today counsel say something about an assertion like that being made in the heat of litigation, but this was not a decision made in the heat of litigation. This is the whole crux of the matter.

Bowman, on its own, before ever talking to Dean, the stockholders of Bowman, the stockholders of Bowman, decided that unless they could find a purchaser for the going concern, they would have to liquidate. They went to find purchasers. They came to us last.

They went to Carnation. They went to Fairmont Dairies. They tried to avoid any anti-trust question. They went to a company called Consolidated Badger and got no interest at all.

The only reason they got any interest from Dean is for the reason I indicated a while ago.

[fol. 217] Dean would not have wanted to take over Bowman unless they had a problem of their own, and they were hoping that by putting the two together they could solve that problem, so they came together and then what happened? Dean investigated the properties and said that they could not pay any more than two-thirds of the net worth of Bowman.

Does this suggest that Bowman could keep going and operate, that Dean could operate it or that Bowman could continue to operate, if the stockholders are willing to sell it for two-thirds of their book net worth?

That is what this deal is about. That's it. And then another thing, and this is in the affidavits: If the deal were made, Dean could only make a deal, Dean could only promise to commit itself for that large sum of money, provided it were in a position promptly to protect itself against the losses that have taken place.

Let me interrupt myself to be sure that I did not overlook one important thing. The Commission says that Bowman is not broke, that they have a lot of cash. As a matter

of fact, they said they showed on their annual reports a net profit for the last two or three years of a small amount.
[fol. 218] I want to be sure that your Honors realize that I have in mind the distinction between their investing some cash in securities and getting a return, and cannibalizing some of their plants and making a profit, which is what they have been doing.

By doing that they have been able to show a profit, but as far as their operations are concerned, their operations have been conducted at a loss for at least the last five years in increasing amounts, to the point where the stockholders took over. The principal stockholder, the biggest single stockholder, is a trust, is an estate of which the Northern Trust Company of Chicago is the trustee. There is another bank in Cincinnati that represents other stockholders.

The affidavits in this case of the majority of the stockholders represent to this Court under oath that they had decided that they would have to liquidate unless they could sell, and they represented to your Honors that if they cannot sell to Dean, which is the only purchaser they think is available, they are going to have to enter into voluntary liqui-
[fol. 219] dation, which is going to involve substantial losses.

They can recover some money in liquidation, but they cannot get what they can get from Dean when they sell as a going concern, provided Dean has the opportunity to try and keep the customers. If the customers should desert them, Dean will not even be able to take over the business.

Judge Swygert: The thing that bothers me, Mr. Chaffetz, is that this is all something that could be gone into and should be gone into and aired out thoroughly and very promptly in a plenary hearing, it seems to me.

Under any Section 7 merger the parties could always say to the Department of Justice or the Federal Trade Commission or whoever is challenging it, "If this does not go right through, the deal is off," so this would be a very powerful argument against granting any relief.

Mr. Chaffetz: I have made this argument myself many times to the Federal Trade Commission and the Department of Justice and prevailed without having to go to Court, and I have made the argument in Court.
[fol. 220] This is one of the facts of life in this kind of situation, and when the Court has jurisdiction, the decisions

make it clear that this is one of the factors that has to be taken into account.

If it is a clear-cut violation, or so clear that the Commission is bound to win in a final hearing, then these circumstances would not weigh with the Court. You certainly would say, "We are not going to let you violate the law", because you would be hurt if you did not. But that is not our case.

What we say is that the facts we have brought to your Honors' attention in short order, because of the nature of the proceeding, on affidavits, because of the nature of the proceeding, indicates in our opinion that there is not any likelihood of the Commission getting an order against us.

The very reason that Bowman will not exist is enough, so your Honors do not have to be concerned about whether the Commission could grant relief at the end of a hearing. There is not going to be any occasion for relief. Bowman will not be here.

[fol. 221] As I say, counsel countered that simply with the statement in the reply brief which says, "Oh, this is all said in the heat of litigation." I say to you that you have a half a dozen affidavits from responsible people, including the vice-president of the Northern Trust Company of Chicago, who tells you that that decision was made some time ago and it is a sound decision, it is a true decision. That is what took place.

There will be no Bowman if a stay is granted here. It seems to me, your Honors, that this is one of the factors you have to take into consideration as to whether there is occasion for granting relief or what harm would come to the public or to the Federal Trade Commission proceedings if you did not grant relief. There are not going to be any Federal Trade Commission proceedings. There is not going to be any Bowman. You cannot keep a dying horse alive. That is the situation here.

Let me say a little bit more about Bowman. This is not just something that was concocted for the purpose of this proceeding. Bowman at one time was the greatest milk [fol. 222] company in Chicago. They built up these home delivery routes and they were the tops in the business. They had twenty-two hundred routes. They had milk plants, they had bottling plants, they had distribution points and they had a fabulous business.

But the whole trend of the business has been against them. The home delivery route now in a big metropolitan area will not pay, it cannot pay, and they were stuck with the biggest home delivery route of any company here.

What has happened here is that with the supermarkets and the chain stores and big grocery stores, they began to handle milk themselves and were able to sell it more efficiently at a lower price to the consumer. The housewife drives up to the supermarket anyway where she buys her groceries and she wants to buy that milk for a cent or two cents or three cents less, if she can.

The result was that as more and more housewives withdrew from buying in this manner, Bowman's routes became more and more costly because their lost volume and cost [fol. 223] per unit continued to go.

To summarize that story, to bring it up to date, Bowman has dropped its routes from twenty-two hundred to five hundred, which they have today. They have closed all of their distribution points. They have closed all of their bottling plants. They have just this one big plant in which they invested a million dollars a little over a year ago, regretfully now, because the investment has not paid off.

Despite what I have just said, and this is half of their busines in Chicago that I am talking about, despite all this, despite the fact that they tried to cut down and eliminate loss routes and minimize their losses, despite that fact, in 1964 there is an affidavit of Arthur Anderson in this file which says they lost a million and a half dollars in Chicago alone in operations.

There cannot be any question of Bowman's good faith. There cannot be any question as to what this case is all about. I simply ask your Honors this question: Can you imagine, if the Commission after a hearing decided against [fol. 224] us and said, assuming there could be a hearing, "Regardless of these facts, we are not going to let Bowman sell out to Dean, they will have to liquidate, if they want to", is there any possibility that this court would sustain such an order?

I think not, but that is not my burden. I do not have to prove conclusively that we would win the case. What I have to do is create a doubt in your mind that there is any real probability that the Commission would prevail, and that is on their own basis, the only legal basis that they suggest in their brief here.

If, under these facts, you have real doubt as to whether the Commission would prevail after hearing, they tell your Honors that you should deny the equitable relief.

Judge Swygert: Is there not a third possibility, besides going out of business or selling to Dean? Is there some other company, such as the one that was mentioned in the affidavit who might acquire Bowman without the possibility of violating Section 7?

Mr. Chaffetz: Let me mention that affidavit. That is the [fol. 225] Wanzer Company.

I have alrea[illegible] said this to your Honors, that Bowman gave considera[illegible] to whom the potential purchasers might be and they believed they had exhausted that list before they came to us. They tried to get somebody outside of Chicago so as to avoid any antitrust question, and then they came to us.

They did not believe and they still do not believe and they represent to your Honors that there was no other possible purchaser.

Let me tell you about Wanzer. This Wanzer affidavit is an irresponsible, reckless, but riskless to Wanzer, attempt to spoil this transaction. We have affidavits which we got just in the last couple of days—when we saw the Wanzer affidavit, we did not believe it, and just in a couple of days we found two people with whom Wanzer had talked, one as far back as last November 9 or November 11, he had lunch with this man on November 11, and Wanzer said to that man, "I know that Bowman is negotiating to sell out to Dean." Wanzer made no move at that time to put in a bid or to tell Bowman, "We might be interested."

[fol. 226] As a matter of fact, Wanzer explained to this gentleman, a responsible individual, the president of a very substantial independent grocery company here in Chicago, that he understood what the problem was and why Bowman and Dean were getting together.

It was only when the papers were filed in this Court that the Wanzer affidavit was submitted here, which simply says, "We would be interested if the price is right." Of course, I would be interested if the price was right. If I could buy it for $100, I think I could liquidate and do something.

There is no commitment. It is, as I say, utterly reckless. Sure, they will say that. You could get a lot of people to say that.

Your Honors, this is not the first time this has happened to me. I have had this experience before this, where this kind of affidavit is brought up at the last minute from a small man, a small company. Their total net worth is only two and a half million dollars.

If there were time and if there were going to be a hearing, I would love to take this gentleman's deposition, but in the [fol. 227] posture in which this is before the Court today, we have gone as far as we can to discredit that affidavit. We have proved conclusively, as far as affidavits can prove anything conclusively, that this man, if he were in good faith, had ample opportunity to put in a bid before we signed the agreement.

This was November 9 or November 11, I cannot remember the exact date, and this agreement was not signed until December 13th. The only other thing they have here is, they said they had a vice-president of the First National Bank call up Bowman sometime earlier and ask if Bowman was for sale.

As far as Bowman is concerned, all they knew was that a vice-president of the First National Bank called and said, "Are you for sale?" He did not mention Wanzer, he did not mention any potential purchaser, but just said, "Are you for sale?"

Wanzer had every opportunity, if they were interested in buying the company, if they really were in good faith, to put in a bid and purchase.

The other thing I wanted to say to your Honors is this: There is not that much difference between Wanzer buying and Dean buying. If Dean should lose the Jewel Tea busi- [fol. 228] ness, which it expects to do, Dean in Chicago will be smaller than Wanzer, and if Wanzer buys Bowman, Wanzer and Bowman will be much bigger than Dean. Dean is not that big here in this market.

Dean has only 7 per cent, and of that 7 per cent, a great chunk of it is just one customer, so that certainly would provide no basis for this Court granting a stay here, pressing Dean to pull out of the transaction and leaving Bowman to pursue the will of the wisp of the possibility of selling to Wanzer. That is what is at stake here.

Under the contract Dean has to notify Bowman whether they are going to go through with the deal before the closing date on Monday. Now, if (before Monday, Dean notifies

Bowman that because there is a stay pending, or because the Court has not acted, Dean has to withdraw, Bowman will have to take its chances on this kind of a proposal. I want to——

Judge Schnackenberg: I want to ask you a question.

Mr. Chaffetz: Yes.

[fol. 229] Judge Schackenberg: You filed a motion today to have the Court make a confidential file of certain things.

Mr. Chaffetz: If that is an anathema to the Court, I will not press it.

Judge Schnackenberg: I think, in view of the revelations now, it is moot.

Mr. Chaffetz: We discussed it with the Clerk yesterday, your Honor. What we had in mind is that we knew there would be this publicity, and we proposed that the pleadings could be copied and made available to people to get the information.

Judge Schnackenberg: Do you withdraw the motion?

Mr. Chaffetz: If your Honor asks me to, I will. Perhaps I should.

Judge Schnackenberg: I think it is moot, now.

Mr. Chaffetz: All right. I will.

(Mr. Stevens spoke to Mr. Chaffetz in a voice inaudible to the Reporter.)

Mr. Chaffetz: Well, Bowman's counsel objects. Let me say what the reason for the motion is. I think it ought [fol. 230] to appeal to your Honors.

Judge Schnackenberg: Do you want to stand on the motion?

Mr. Chaffetz: What I would like to do is this: I would like to have the documents in the case be placed in a confidential file. This is what we ask, that the documents in the case be placed in a confidential file in the Clerk's office and not be made available to the press or the public.

What they can glean out of what they have heard this afternoon will be words, but they will not have the written material.

Judge Swygert: Do you make a distinction between the briefs and the affidavits?

Mr. Chaffetz: No; the briefs and affidavits.

Judge Swygert: You do not think there is any difference?

Mr. Chaffetz: No, no, because the briefs simply incorporate the material from the affidavits.

Judge Schnackenberg: What is your motion now, then?

Mr. Chaffetz: The motion, as we prepared it, was that the documents——

Judge Schnackenberg: Not what it was. What is your [fol. 231] motion now?

Mr. Chaffetz: The motion now is that the briefs and affidavits be placed in a confidential file in the Clerk's office until the further order of the Court.

Mr. Stevens: At least, if your Honors please, until the disposition of the main motion. That would be the relief we urgently seek.

Judge Schnackenberg: What motion are you relying on, the written motion you have made here, or some substitute motion?

Mr. Chaffetz: To my knowledge the written motion squares with the oral motion I just made. We intended, at least in the written motion, simply to ask that the written

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Judge Schnackenberg: We are depending on something definite here. Now, is the written motion the motion you are making?

Mr. Chaffetz: Yes, your Honor.

Judge Schnackenberg: We will rule on that in due course.

Mr. Chaffetz: Thank you very much.

I want to mention two more points in connection with the merits and then I want to come to the procedural ques- [fol. 232] tion, the jurisdiction of the Court, and I will try to be brief. I want to be sure that I leave the impression with your Honors that if this transaction is concluded, competition in Chicago will not be handicapped, but we maintain will be furthered.

What Dean has already decided to do, and it is in the affidavits and has been told to the Commission, is to get rid of these retail routes at the first moment. That is half of the Bowman business. They are going to turn it over to the small dairies who now, more profitably than Bowman can do it, have similar retail routes, which will help to improve their position.

I might say on that score that if the Commission wants to discuss with us what we will do, we will be glad to discuss it with them. We want to turn over the retail delivery routes, half of the business in Chicago, to small independent dairies who have similar routes now.

Judge Swygert: Do you think they will take it?

Mr. Chaffetz: Yes. We think they will, for this reason, your Honor: The problem is volume. A milk driver comes down your street and he has three or four stops on that [fol. 233]street but he may miss five or six houses. If he can fill in and the same driver can serve two or three times as many stops, that reduces the cost tremendously, particularly since the union rates, and I have not mentioned that at all, the union rates in this business are very high.

Judge Swygert: But he will not be selling Dean or Bowman milk.

Mr. Chaffetz: Milk, of course, is really a homogeneous thing. Each man packages under his own name and milk frequently comes from the same dairy. It would be up to the individual.

He may package his own milk, if it meets his specifications, but that has to be worked out. I am not an expert on that. The idea is, however, to make this volume available to the small dairies and hopefully to allow Dean to recoup some of its costs. That is the only way Dean expects to get back some of the consideration.

As I say, this will improve the situation here in Chicago. We are not going to end up with a monopoly or a dominant company or any company with a large percentage of the market. What we are going to end up with is that the [fol. 234]small dairies, those who are better able to handle this business, will be better off, the independents in the market will have a much bigger share of the market than they ever had before, and if Dean loses the Jewel Tea business and only is able to hold something less than half of the Bowman business, they will not be any bigger than they are now and they will still be a small company with something like twenty millions of sales in the Chicago market.

With respect to the law, there is any number of cases like this. I am talking about on the merits, now. I would like to mention one in which I participated myself before Judge Grubb in Milwaukee. This was one in which the Department of Justice brought the case.

This was a case in which Gimbel's the biggest department store in Milwaukee with facilities all over the country, purchased the other big department store in Milwaukee, Shuster's. Between the two of them, they had 54 per cent of the department store business in Milwaukee.

The Department of Justice made the same prima facie argument, that that is per se illegal, 52 per cent, that that [fol. 235] would violate not only the Clayton Act but the Sherman Act.

When Judge Grubb heard the evidence—it was on affidavits, but when he heard the evidence he said to the Government, "But Shuster's are not going to survive. Their losses are mounting year after year, they are worse and worse. Their competitors come in and tell me that it will hurt the community if this Shuster store closes down. One store has already closed," he said, "and the second is already in jeopardy."

He said, "There is no occasion for a court enjoining something that will enable the stockholders of Shuster's to get some of their money back, and if Gimbel's can take these stores over and operate them, isn't that good for the community?"

After careful deliberation and a long hearing, Judge Grubb denied the temporary injunction—that was not a restraining order, that was a motion for an injunction—and the Department of Justice never appealed, never proceeded further, and that was the end of that.

When United Air Lines bought Capital Air Lines there [fol. 236] was the same argument. They said, "Capital Air Lines is not bankrupt. It has a lot of money. Oh, sure, its operating losses are very high, but under the law United is too big, they can't buy Capital Air Lines."

But the Court said, and I think this was the District of Columbia Circuit, "Oh, now, don't tell us that. We are not going to force Capital Air Lines to go broke and liquidate. We think the best thing in the public interest is for United to take over Capital Air Lines."

In the Ling-Temco case, there was the same situation. There were two companies down in the Southwest and one was having serious troubles. It was not bankrupt, there was not a situation in which it was going to fail tomorrow, but their operating losses were mounting and there was no hope of survival, there was no hope that they could come back.

It was a good faith situation. They really were in financial straits in the sense that they could not earn a profit, and they were allowed to merge with Chance-Vought.

You have to distinguish that type of situation from the

[fol. 237] Erie Sand & Gravel cases, where a company has not shown that it is having real financial reverses but simply says, "Well, we would like to sell out", and that was the case. They said, "We would have sold out anyway if our No. 1 competitor did not buy us out", and the Court said, "Well, that is not enough." I would not come before you and urge that kind of a proposition here.

The Diebold case cited by counsel was a summary judgment case. If you will read that opinion you will see that what the court was concerned there with was that the court made the decision in an antitrust case on summary judgment, and the case was sent back for a full hearing.

I say to your Honors that on this record, with the limited facts that could be brought before your Honors on short notice because of the nature of this proceeding, it is clear that, first, Bowman is not going to survive, there is no occasion for maintaining the status quo, you cannot maintain the status quo, you cannot keep Bowman going, you cannot require them to keep Bowman going and you should not want to keep Bowman going.

[fol. 238] I would hope that you should think that in the public interest, if your Honors please, it is better that this transaction take place, and under those circumstances, I submit, and this is only tentatively, it is not a final hearing, but on the basis of the facts before you, the best you can do with the materials available, the best we could do in presenting the facts to you, as far as you now can see, as far as you now can see, you cannot conclude, I submit, that after a hearing before the Federal Trade Commission, if there should be one, the Commission would probably find a violation of the law and that this Court would sustain such a judgment of the Federal Trade Commission if they made it.

Let me come now very briefly to the question of jurisdiction. The question of jurisdiction arises in this posture: It is not a matter of what the jurisdiction of this Court might be if there were no administrative statute governing the administrative agency here.

Apart from the Federal Trade Commission Act and the Clayton Act, I am not sure myself what the jurisdiction of [fol. 239] the Court might be under varying circumstances.

At least the point here, the point that the Second Circuit made was that where Congress has acted and there is a

statutory plan, the Court has no authority to substitute its judgment for that of Congress as to what the statutory plan ought to be. That is really the issue here.

Judge Swygert: Either fortuitously or because of an administrative division of work, the Attorney General can come into a District Court and have the standing——

Mr. Chaffetz: Precisely.

Judge Swygert: (Continuing)—to ask for it and the District Court may grant it, and only because of a different route a different result eventuates, is that not correct?

Mr. Chaffetz: That is a choice that the agencies made. Your Honors were told that they talked about it and they decided the Commission should do it.

I think this, and I think it is very unfortunate: I think it is possible, and I hope I am wrong about this, that the agencies just concluded that this case would be a good [fol. 240] vehicle for another court test of the jurisdiction and the interests of the parties just pass along with it. I think if that is true, this is most unfortunate.

There is a lot at stake here and I think it would be very unfortunate if this transaction were allowed to die. It is even worse than this, your Honor, because there will be no ultimate test. As I said to your Honors, this is the last hearing.

If the parties contemplate getting a Supreme Court decision on this after a hearing before the Supreme Court months from now, there is not going to be any such hearing. This transaction is not going to survive. It can't.

At the very best, at the very best, if, come the closing date and Dean cannot close this transaction with the assurance that the courts are not going to interfere, Dean is going to have to say, "All bets are off. Six months or a year from now we will be glad to sit down and renegotiate with you again, if that is possible, but we cannot commit our $12,000,000 without knowing what we are going to get or when", and I think your Honors must appreciate that a business man cannot possibly do that.

[fol. 241] With Bowman losing money at the rate I have said here, with this publicity possibly stimulating a lot of other Bowman customers to desert, they might say, "Well, we are not going to stick with Bowman, they are selling out and they are going to liquidate, we will go some place else", Dean's only hope is to conclude this transaction as promptly as possible.

I delayed this thing more than anybody else. I wanted to give the Commission time. They wanted to conclude the moment they had an agreement because they were afraid of publicity ruining the transaction, ruining the deal.

I insisted that we wait until January 3, and then we postponed it until January 10 so that we could have this hearing. They are terribly concerned. There is a lot of money involved for a small company. A small company cannot take that risk.

It is not a matter of choice. As I say, it is not a matter of burdening the courts or of oppressing the Commission. They can't help it.

If they can close and get about their business very [fol. 242] promptly, and even if they do close and get about their business very promptly, there is very serious risk involved here. They may not get their money back. They hope, however, to solve their problem.

Now, let me come back to jurisdiction for a moment.

Judge Swygert: I hestitate to ask it again, but they do not have to go completely through with the transaction, do they? Is there not a method whereby a situation could be worked out under an order that would hold things somewhat in status quo so there would not be the problem of complete divestiture?

Mr. Chaffetz: There are two answers to that, your Honor, and I can only give one unless Judge Schnackenberg will let me go off the record for the other one.

The first answer is that this is such a complicated thing. These are obsolete and obsolescent plants. They are scattered over wide areas. There are trucks, there is equipment, there are customers.

Dean has to have maximum flexibility just to be sure it [fol. 243] protects this amount of investment. Conceivably they could renegotiate the deal and say, "We will not take this plant, we will not take this plant, but we will pay you that much less money."

Judge Schnackenberg, I would like again to renew my request to file a supplemental affidavit to put in the record what I am about to say in view of Judge Swygert's question, because the fact of the matter is that when we presented these matters to the Commission, we invited them to invite us down there in the event they had any particular aspects of the transaction that they objected to that they

would like us to deal with, because we thought that if they were worried about the situation in Podunk, we would try to meet it, or if they were worried about the situation in Cleveland, if we could possibly work it out between the parties we would try to.

We made it clear again and again and again that if there were any aspects of the situation or any particular parts of the transaction that they were concerned with they should invite us down so we could talk about it, but we [fol. 244] never heard any response to that suggestion.

We would have been willing to sit down with them then, before the contract was signed, before the matter became public, and satisfy them if we could in minor respects—I do not mean in major respects, but in minor respects, if we could have.

But today, in this posture, it just is not practical, your Honor. It is not practical. We become indebted to them on Monday morning for $12,000,000 and the only out we have under the contract is to call the thing off.

Judge Schnackenberg: You say you want to file an affidavit?

Mr. Chaffetz: I would like to file an affidavit simply to put myself under oath with respect to the statement I just made to Judge Swygert.

Judge Schnackenberg: I suggest that you make a motion in writing——

Mr. Chaffetz: Very well, your Honor.

Judge Schnackenberg: (Continuing)—and file it with the Clerk, stating the purpose of that.

Mr. Chaffetz: I will be glad to do that, your Honor.

[fol. 245] Judge Schnackenberg: We will rule on it in due course.

Mr. Chaffetz: Thank you very much, your Honor.

Judge Schnackenberg: Before you get away——

Mr. Chaffetz: I am not through yet.

Judge Schnackenberg: (Continuing)—I want to make sure whether you are abandoning in any manner or to any extent the position taken in your documents filed here.

In your brief in opposition to the Commission's emergency petition for preliminary injunction and other relief, citing page 34, you say:

"The applicable statutes and court decisions leave no doubt that Congress did not intend to give the Federal Trade Commission power to obtain preliminary injunctive relief."

Are you still insisting on that?

Mr. Chaffetz: Oh, there is no question about that, your Honor. I have no reservations at all about that.

Judge Schnackenberg: You are or you are not?

[fol. 246] Mr. Chaffetz: I am not abandoning that position. That is our position. I think it is as clear as the driven snow.

Judge Schnackenberg: You do not have to dress it up any. You are standing on that?

Mr. Chaffetz: Absolutely. I was just about to continue my argument on that point, your Honor. I said I was not completed.

Judge Schnackenberg: All right. That is the most interesting thing. That is what I came to hear today.

Mr. Chaffetz: I am glad.

Judge Schnackenberg: I have not heard you say anything about that yet.

Mr. Chaffetz: Let me be candid about that, your Honor.

Judge Schnackenberg: I assume you are candid with us on everything.

Mr. Chaffetz: I want to be. I think we are right on that point. I do not think there is any question that this Court has no jurisdiction. All you have to do is just quote the Chairman of the Commission.

Judge Schnackenberg: It is not a question of whether [fol. 247] we have jurisdiction.

Mr. Chaffetz: Yes.

Judge Schnackenberg: The question is, does the Commission have jurisdiction to be here.

Mr. Chaffetz: Precisely. They do not have. I am going to deal with that in a minute, your Honor, but let me tell you why I argued this matter the way I did. I may be wrong about this, but I want you to know at least what my strategy is.

Judge Schnackenberg: We will tell you where you are wrong. Argue that, now.

Mr. Chaffetz: All right. I will, your Honor.

In the first place, the statute provides what the authority

of the Commission should be. It provides what the authority of the Department of Justice should be. It provides what the private parties' rights may be.

Then you come to the amendment of Section 11C in 1959, where the Congress, taking note of the situation again, reviewing the situation once more, again amended the statute, this time giving the Commission some relief in the prem-
[fol. 248] ises, because it says that the Court of Appeals, once jurisdiction attaches, once jurisdiction attaches, has the right to grant any equitable relief required in the premises.

I say that alone is conclusive. If Congress in 1959 says that you have that jurisdiction once the record is filed here, does it not mean that you do not have that jurisdiction and the Commission does not have the right to ask for it before the record is filed here?

That is what I refer to as the statutory scheme. That is what the Second Circuit said about it.

Judge Swygert: The Seventh Circuit?

Mr. Chaffetz: The Second Circuit. I may have misspoken.

Interestingly enough, in a different situation, where the Congress thought that the Commission should have authority to go to the courts, they amended the statute, the Federal Trade Commission Act, in 1938, in the Wheeler-Lee Act, Section 13 of the Federal Trade Commission Act, and they gave the Commission there limited authority to pro-
[fol. 249] ceed in the courts where false advertising was involved and where the Commission was of the opinion that they should get relief in the courts without waiting for a full proceeding.

Again, Congress is planning the authority that the Commission should have. I thought Judge Swygert asked a very interesting question of Mr. Stern about why, if the Court could act in these cases, it could not act in all cases, in a Section 5 case, in a Robinson-Patman case. Logically, there is no difference.

Suppose the Commission has a Robinson-Patman case and they are worried that before their hearings are over within three months or six months or a year, the little fellows being adversely affected will be out of business. Why wouldn't they be up here asking your Honors for temporary relief to protect your jurisdiction until after

they have had a chance to act? They would say, "It will be moot. We will not need a proceeding because it is going to be too late at that time."

The logic of their argument is that in any case where Congress has limited the Commission to acting in a slow, [fol. 250] steady way, with hearings, appeals, final reports, motions and a petition for review, because Congress has set up the Commission as that kind of agency, has seen fit to do so, why shouldn't they come in here every time, in every one of their cases and say, "It takes us a year, so we want the court to grant preliminary relief"?

I have cases down there that have been there four or five years, and——

Judge Swygert: Do you think it would be better if you took Section 7 out of the Federal Trade Commission Act completely?

Mr. Chaffetz: No, no. They have had many Section 7 cases. All the cases are not of this kind, but when they have a case of this kind the Department of Justice has authority. We have but one Government. I do not understand this treaty between them, that the Federal Trade Commission will handle milk cases.

As a matter of fact, there have been a number of Department of Justice milk cases right here in Chicago. One of the most famous milk cases, the Borden case, was right here in Chicago and that was a Department of Justice case. [fol. 251] Judge Swygert: Perhaps there is too much cooperation between them.

Mr. Chaffetz: I do not know about that, but they come before the Court——

Judge Schnackenberg: I will have to stop you right there. Your time is up.

Mr. Chaffetz: Thank you very, very much, your Honors.

Judge Schnackenberg: You have had one hour. Thank you very much.

Mr. Stevens: May it please the Court, may I have just two or three minutes on behalf of the Bowman Dairy Company?

Judge Schnackenberg: You are Mr. Stevens?

Mr. Stevens: Yes.

Judge Schnackenberg: Whom do you represent?

Mr. Stevens: The Bowman Dairy Company.

Judge Schnackenberg: How much time do you want?

The hour has been taken up that was assigned. How much time do you want, Mr. Stevens?

Mr. Stevens: Certainly no more than five minutes. I will try to be through in two or three.

Judge Schnackenberg: You may go ahead.

[fol. 252] ARGUMENT ON BEHALF OF BOWMAN DAIRY COMPANY BY MR. STEVENS

Mr. Stevens: If the Court please, Mr. Chaffetz and I decided that in the interest of orderly procedure we would not divide the argument, because we understand the problem this Court has with matters, not of this kind because nothing quite like this has ever been before the Court before, but I do want to comment very briefly on the procedural situation because it is a matter of vital importance to the Bowman Dairy Company.

It is brought here as a test case, to test out a jurisdictional issue, but the outcome of this case has a very practical significance to the stockholders of the company.

Now, what is our procedural situation? They are here under a statute, the All Writs statute, which was originally designed, and it is a very ancient statute, to enable the Courts to preserve their historic jurisdiction, and historically this is an appellate court. It acts on briefs and on a record which is made in detail below, where the parties have an opportunity to cross examine and work out these various collateral issues that have been brought to the fore here and create problems that I do not, with all due re-
[fol. 253] spect, feel that this Court historically is used to dealing with.

Working out the kind of order which would preserve the Bowman Dairy Company, which is losing money at the rate it is in the Chicago market, is a problem that cannot be decided on an emergency matter of this kind. It is just too serious, with all due respect to the skill and all the other abilities that the Court has. This proceeding is not appropriate for this Court.

The Diebold case which Mr. Stern cited was a case in which the Supreme Court sent the matter back because it was decided on affidavits. The question of the failing company doctrine cannot be appropriately resolved on affidavits.

The failing company doctrine, if I may just mention it, involves the question of whether there is an adverse competitive effect on the market that is relevant. The market that is relevant, according to the Commission, is the Chicago milk market. Will the change in the operations of the Bowman Dairy Company hurt competition, if they are bought by Dean, any more than if they continue to lose [fol. 254] money at the rate they are losing and piecemeal have a liquidation over a period of time, which they are clearly going to have?

You only have to look at the statistics as to Chicago to see what is going to happen to this company in the only relevant competitive market.

Should this Court be deciding this issue, which affects real people, on the basis of a group of affidavits and the kind of record we have before us? I think the record conclusively shows the effect of this proceeding on the Bowman Dairy Company, and I urgently urge the Court to confine its jurisdiction to its historic function, and I respectfully suggest that when the Commission says they will be through with this proceeding in a year, "Just hold tight for a year and you will not have any problem", you will have a different bundle of assets a year from now than you have now, what they will be, I cannot tell the Court, but we know the history up to the time this matter became public knowledge.

What it is in the last few days since it has become public [fol. 255] knowledge is not in the record, but it certainly is not going to be any more favorable.

Finally, when Mr. Stern says, "Well, although the Commission has not been here for fifty years in a proceeding like this, and this is unique to come in in a Section 7 case, we do not think we will have any other cases other than Section 7, we will not bring in Robinson-Patman cases, we will not bring in fictitious advertising cases, we will not bring in any of those", how do we know?

They have not thought of it yet, but what do we know as to what they will think of for this Court to do and convert its function from an appellate court to, really, a trial court where you will be hearing matters of this kind necessarily on the evidence, because that is what you have to act on.

Judge Swygert: Of course, that argument can be met by

saying that that problem can be met at the appropriate time, whenever they try to come in on a Section 7 case.

Mr. Stevens: The legal argument, your Honor, is precisely the same, whether it is Section 7 or not, and I do [fol. 256] not know the legal distinction between a Section 7 case and any other case.

If anything, I would respectfully suggest that their position is weaker in a Section 7 case, because the violation does not occur, if any, until the acquisition takes place, and the signing of the contract is not an acquisition.

They try to rely on a Sherman Act situation, but they have not relied upon it because the Sherman Act is not what is alleged to be violated.

With all due respect, I suggest that a Pandora's box is about to be opened if the Court accepts the invitation to make a test case out of this proceeding. Thank you very much.

Judge Schnackenberg: Do you agree with Mr. Chaffetz's contention that the Commission has no right to initiate this proceeding in this Court?

Mr. Stevens: We think it abundantly clear, your Honor, that there is no——

Judge Schnackenberg: Yes or no? Do you agree?

[fol. 257] Mr. Stevens: That there is no jurisdiction, yes, and further, that even if there is jurisdiction, it would be thoroughly——

Judge Schnackenberg: No jurisdiction in the Commission to initiate this proceeding in this Court? Is that what you are saying?

Mr. Stevens: Yes, your Honor.

Judge Schnackenberg: Very well. Thank you very much.

Mr. Chaffetz: Your Honor, I do not wish to argue further. I would like to just call your attention to the fact that we do have a motion to vacate the stay that your Honor signed two or three days ago, and I have no doubt you have that in mind.

The closing date is Monday under paragraph 8 of the agreement, and we have to notify Bowman before the closing date if we want to withdraw from the agreement.

Judge Schnackenberg: Yes. We will finish with the rest of the arguments now. You have six minutes left, Mr. Stern.

[fol. 258] ADDITIONAL ARGUMENT BY MR. STERN

Mr. Stern: Mr. Chaffetz invites the Court to put aside the jurisdictional question and instead deny on the merits.

I appreciate Mr. Chaffetz's generosity in attempting to consent to our argument that there is jurisdiction. However, I will read two sentences from the Brown Shoe opinion, which is 370 U.S., and I am reading at page 305:

> "The mere consent of the parties to the Court's consideration and decision of the case cannot by itself confer jurisdiction on the Court", citing cases.
>
> "Therefore, a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before it", citing cases.

The Court can affirm, it can dismiss or it can—excuse me. The Court can grant the petition, it can dismiss the petition or it can deny the petition. If it denies the petition, however, it will decide that it has jurisdiction.

I only wish to draw to the Court's attention that dismissal and denial are not the same as the Second Circuit [fol. 259] recognized in the International Paper case, where it dismissed.

I, of course, urge, for the reasons I have given before, that the Court has ample jurisdiction to act in the premises.

We have here an acquisition in which the first ranking firm, what is probably the first ranking firm, is acquiring the third ranking firm, and it will be by far, after the acquisition, the first ranking firm. It will have 16 per cent plus 7 per cent, which is 23 per cent.

In Exhibit I, our affidavit to the reply memorandum submitted today, we show that the number of dairies in Chicago has declined from 107 in 1954 to 70 in 1961 to 57 in 1965. That is, half of the dairies have gone out of business.

It is our position that these facts make out a prima facie case that there is a sufficient showing on this basis that a violation of Section 7 and Section 5 will probably be found by the Commission.

This evidence, this showing, has not been rebutted by any substantial showing.

Judge Swygert: What do you say about the representa- [fol. 260] tion that there will be no hearing because Bowman will be out of existence?

Mr. Stern: This is a situation like a contempt, where the party in contempt holds the keys to his prison. They can cancel their contract, they can go out of business, they can do many things if they choose to. We cannot control them.

I think that the threats of parties cannot be allowed to control the Court's exercise of its jurisdiction.

If the Court believes that this will violate the law, if the transaction is completed, and if the Court believes, as we have urged, and I think the parties are agreed that it will not be possible to restore the status quo, but the mere fact that one of the parties says, "Well, I am not going to stand by and allow you to interfere with my transaction, I am going to go out of business, or I am going to call off the deal, I will not renegotiate it. If you do not let me do this on Monday, I will not do it", I really do not think that the Court, in the sound exercise of its discretion, should allow such considerations to prevent it from doing what it regards to be its responsibility.

[fol. 261] The only other thing I have to say is that we oppose this motion to vacate the Court's temporary restraining order, and we move, as we have in our papers. that the Court enter a temporary restraining order so that we may exhaust our remedies in the circumstances.

Judge Schnackenberg: Thank you, gentlemen. This matter will be taken under advisement as to the issues of a temporary or preliminary injunction, and the temporary restraining order heretofore issued will remain in effect until further notice. The Court will now rise.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

[fol. 262] Reporter's and Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 264-266] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

Motion to Supplement Record By Addition of Affidavit of William R. Jentes—Filed January 7, 1966
(omitted in printing.)

* * * * * * *

[fol. 267] [File endorsement omitted]

STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF WILLIAM R. JENTES IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION—Filed January 12, 1966.

WILLIAM R. JENTES, being first duly sworn, on oath deposes and says that:

1. He is one of the attorneys for Dean Foods Company, one of the respondents in this proceeding.

2. On November 2, 1965, Mr. Hammond E. Chaffetz and affiant met with Mr. Robert A. Hammond, Chief of the Merger Section of the Federal Trade Commission's Bureau of Restraint of Trade, at the latter's office in Washington. Mr. Chaffetz explained to Mr. Hammond that his purpose was to discuss with Mr. Hammond in a preliminary way a possible sale by Bowman Dairy Company of its dairy operations to Dean Foods Company. Mr. Chaffetz stated that he was speaking for Bowman as well as for his client, Dean Foods Company. Mr. Chaffetz then recited the essential facts of the proposed transaction and the factual setting in which it arose. Among other things, he explained that:

a. Bowman had been suffering severe operating reverses in recent years, including a substantial decline in sales and large operating losses.

[fol. 268] b. These operating losses were particularly severe in Chicago, due primarily to a shift in consumer buying habits from home delivery, in which Bowman had long been heavily concentrated, to store purchasing.

c. Bowman's management had made every effort to find an internal solution to its financial and operating difficulties, but had finally come to the conclusion that the only way to halt its operating losses was to withdraw from the dairy business.

d. Bowman's management and its stockholders had, accordingly, concluded that it must either sell its dairy operations to another company or effect a piecemeal self-liquidation.

e. Bowman had approached Dean, which it felt would be the only realistically available purchaser, and was currently negotiating a possible sale to Dean.

f. Dean was interested in the transaction primarily because it was threatened with the loss of its largest single account, Jewel Tea Company, which could have a significant effect on its sales, profits, operating efficiency and competitive vitality.

g. Dean planned to sell Bowman's home delivery routes to smaller dairies in Chicago which would tend to strengthen their competitive position in the market.

3. At the conclusion of the November 2nd meeting, Mr. Chaffetz told Mr. Hammond that, while he was not asking [fol. 269] for the Commission's approval of any proposed sale, he wished the Commission's staff to be fully advised concerning the transaction and have an opportunity to satisfy itself concerning the factual statements which he had made. Mr. Chaffetz stated that Bowman and Dean would shortly forward to Mr. Hammond statistical data which the companies felt the Commission's staff might find helpful in its analysis. Mr. Chaffetz further offered to have representatives of the two companies come to Washington to meet with Mr. Hammond or the members of his staff to answer any questions they might have about the proposed transaction.

4. On November 4, 1965, affiant forwarded a seven page

letter to Mr. Hammond outlining for him the facts relating to the proposed transaction. Attached to affiant's letter were twelve enclosures; these included such items as the balance sheets and income statements for Dean and Bowman, a preliminary draft of the purchase agreement, a list of Dean and Bowman facilities, a list of competitors in the areas where Dean and Bowman operate, etc.

5. On November 12, 1965, affiant and Mr. Donald Kempf, another of respondents' counsel, met in Chicago with Mr. Mark Haase, a staff investigator for the Federal Trade Commission, who interviewed Mr. L. Edward Hart, one of Bowman's directors and its counsel, during the morning and Mr. Kenneth Douglas, one of Dean's Vice Presidents, during the afternoon. At the outset of both interviews, Mr. Haase was told that the Bowman and Dean representatives [fol. 270] were prepared to answer any questions which Mr. Haase might have and to provide him with any statistics or other information he might request. Consistent with this position, Mr. Hart and Mr. Douglas freely responded to all questions posed by Mr. Haase and fully explained to him all aspects of the proposed sale by Bowman to Dean as well as its competitive implications in Chicago and elsewhere. At the conclusion of the interviews, Mr. Haase expressed his appreciation for the complete cooperation given to him by Dean and Bowman and stated that his questions had been answered to his satisfaction. Affiant then invited Mr. Haase to talk with other Dean and Bowman representatives and also with the officials of the Northern Trust Company who, as co-executor of the estate of Lula E. Bowman, controlled the largest block of Bowman stock.

6. On November 19, 1965, affiant wrote Mr. Haase forwarding six additional enclosures, which supplied information requested by Mr. Haase during his interviews in Chicago.

7. On December 3, 1965, affiant received a telephone call from Mr. William Boyd, Jr., who had replaced Mr. Hammond as the Chief of the Commission's Merger Section. Mr. Boyd stated that the Commission staff had considered the data supplied to it and that it was the staff's conclusion that it would recommend an investigation of the Bowman-Dean transaction in the event that the proposed sale was consummated. Mr. Boyd further stated that it was the staff's tentative conclusion that it would recommend that a complaint be filed, although he indicated that a final con-

[fol. 271] clusion would have to await further investigation. Affiant stated that since Mr. Boyd had only recently assumed his new position and had not personally discussed the proposed transaction with counsel or any officials of Dean or Bowman, he would appreciate an opportunity to discuss the matter with Mr. Boyd at his office.

8. On December 7, 1965, affiant and Mr. Kempf met with Mr. Boyd and Mr. Haase at the Commission's offices in Washington. During this conference, affiant again reviewed the facts of the transaction and invited Mr. Boyd to discuss any of the matters about which he had any questions with top officials of Bowman, Dean, or other interested parties. Mr. Boyd stated, however, that he did not feel that such discussions were necessary. Mr. Boyd also declined to discuss any alternative to a complete abandonment of the proposed transaction by Bowman and Dean. He also declined to discuss the methods by which Dean planned to dispose of certain of the Bowman assets and the persons or companies to whom such assets should be sold.

9. On December 14, 1965, affiant called Mr. Boyd to inform him that Bowman and Dean had signed a purchase agreement the preceding day. Affiant explained to Mr. Boyd that neither Bowman nor Dean wished to appear to be defying the Commission. Affiant stated that both companies had simply concluded that, in view of the transaction's importance to them and counsel's conviction that no violation of [fol. 272] the anti-trust laws was involved, it was in the best interest of all concerned to enter into the agreement.

10. On December 20, 1965, Mr. Boyd called affiant and informed him that the Commission would file an administrative complaint and would seek a preliminary injunction against the closing of the proposed Dean-Bowman transaction. This was the first notice given to either Bowman or Dean that the Commission planned to seek to stay the transaction or request that the assets be separated and maintained in status quo.

In Witness Whereof the undersigned has executed this affidavit this — day of —, 1966.

———, ———.

Subscribed and sworn to before me this — day of —, 1966.

———

[fols. 273-275] Proof of Service (omitted in printing.)

[fol. 276] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AFFIDAVIT OF WILLIAM J. BOYD, JR.—Filed January 18, 1966

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, ss:

1. My name is WILLIAM J. BOYD, JR. I am the Chief of the Division of Mergers, Bureau of Restraint of Trade, Federal Trade Commission. My business address, and that of the Federal Trade Commission, is Washington, D. C. 20580.

2. I became Acting Chief of the Commission's Division of Mergers on November 22, 1965, and Chief of the Division on December 9, 1965. Upon assuming the position of Acting Chief, I was informed of the proposed acquisition of Bowman Dairy Company by Dean Foods Company and of the status of the Commission's investigation of the proposed acquisition. I was informed by my predecessor, Mr. Robert A. Hammond, and by Mr. Mark W. Haase, the attorney in the Division of Mergers handling the investigation, that, *inter alia*, the following events had taken place:

a. On November 2, 1965, Mr. Hammond met with counsel for Dean Foods Company in Mr. Hammond's office in Washington. Counsel for Dean stated that, while no formal agreement had been reached, Dean planned to acquire Bowman. Counsel stated that while Dean was not interested in obtaining a formal Advisory Opinion, pursuant to Sections 1.51-1.54 of the Commission's Rules, it was interested in obtaining an informal reaction from the staff [fol. 277] of the Division of Mergers as to the legality of the merger and the likelihood that a complaint would be recommended against the acquisition if consummated. Counsel for Dean indicated that Dean planned to acquire Bowman on December 4, 1965 and requested a staff reaction before that date. It was further indicated that Dean would not want to acquire Bowman if it appeared likely that the Federal Trade Commission would challenge the acquisition. Counsel for Dean also indicated that Dean was prepared to agree to Commission approval of the dis-

position of certain Bowman assets. Mr. Hammond agreed to convey to Dean the requested staff reaction by December 4, 1965.

b. Mr. Hammond then instructed Mr. Haase to initiate an investigation of the proposed acquisition. Accordingly, Mr. Haase reviewed certain information supplied by counsel for Dean in a letter dated November 5, 1965. Also, on November 5, 1965, Mr. Haase telephoned counsel for Dean requesting additional information. On November 12, 1965, Mr. Haase interviewed officials of both Dean and Bowman in Chicago. On November 19, 1965, Mr. Haase telephoned counsel for Dean in Chicago to ascertain when the additional information requested in the November 5, 1965 letter could be expected; this information was received on November 23, 1965.

[fol. 278] 3. On or about November 30, 1965, Mr. Haase recommended to me that Dean be advised that the staff believed, on the basis of its investigation and the information made available by Dean, that the acquisition of Bowman would violate the antitrust laws.

4. On December 3, 1965, I telephoned William R. Jentes, counsel for Dean, to advise him that the staff had carefully considered the matter and had concluded that (1) the acquisition of Bowman by Dean would raise serious questions under the antitrust laws, (2) a formal investigation would be initiated if this acquisition were consummated, and (3) on the basis of the information now available the staff would recommend that the Commission issue a complaint against the acquisition. I strongly recommended, however, that Dean seek a formal Advisory Opinion from the Commission.

Mr. Jentes stated that his client still did not wish a formal Advisory Opinion but he indicated a desire to speak with me further on the matter since I had only recently assumed the duties of Division Chief. I stated that I had telephoned because of Dean's request for a staff reaction no later than December 4, 1965, but that I would be happy to talk with counsel or with officials of Dean and Bowman.

5. On December 6, 1965, I received a telephone call from Mr. Jentes requesting a conference the following day. I agreed.

[fol. 279] 6. On December 7, 1965, Mr. Haase and I met with counsel for Dean, Mr. Jentes and Mr. Donald Kempf.

At the end of this conference, I again stated the staff's belief that the proposed acquisition would violate the anti-trust laws and that a complaint would be recommended if the acquisition were consummated. Once again, I recommended that Dean seek a formal Advisory Opinion from the Commission.

I did not "decline to discuss any alternative to a complete abandonment of the proposed transaction" at this meeting. Nor did I "decline to discuss the methods by which Dean planned to dispose of certain of the Bowman assets." I did state to counsel for Dean that, in view of the fact that Dean planned to retain Bowman's most lucrative assets and business, particularly in the areas in which Dean and Bowman compete with one another, settlement on such a basis would be unacceptable.

7. On December 14, 1965, I received a telephone call from Mr. Jentes. He stated that Dean and Bowman had executed a formal purchase agreement and that the closing date for the acquisition was January 3, 1966. I requested, and Mr. Jentes agreed to furnish, a copy of the purchase agreement. This agreement was received on December 16, 1965. Until December 14, 1965, there was no evidence in the possession of the Commission that Dean and Bowman had formally agreed to the acquisition.

[fol. 280] 8. On December 20, 1965, six days after being advised that Dean and Bowman had formally agreed to merge, I telephoned Mr. Jentes and advised him that the Federal Trade Commission had determined to issue a complaint challenging the acquisition and further that the Commission intended to seek a temporary restraining order, preliminary injunction, and other appropriate relief.

William J. Boyd, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 17th day of January, 1966.

Frances Pileggi, Notary Public.

My Commission Expires Dec. 31, 1968.

[fol. 281] Certificate of Service (omitted in printing.)

* * * * * * *

[fol. 282] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

Before—Circuit Judges ELMER J. SCHNACKENBERG, LATHAM CASTLE, LUTHER M. SWYGERT

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

ORDER DISSOLVING THE TEMPORARY RESTRAINING ORDER AND DISMISSING THE PETITION—January 19, 1966

Federal Trade Commission, petitioner herein, filed its petition in this court on December 30, 1965 praying for a preliminary injunction, a temporary restraining order and other relief in aid of the jurisdiction of this court, under 15 U.S.C. §§ 21 (c) and 45 (c), to review final orders of the Federal Trade Commission, and therein represented to this court that the question presented was "whether this Court should exercise its discretion to grant equitable relief to preserve the status quo *pendente lite*, where the respondents will imminently consummate a merger (1) which will probably violate the antitrust laws, and (2) against which the Commission's ability to enter an effective order will probably be seriously impaired, unless the respondents are appropriately restrained by this court."

According to petitioner, the statutes involved are: the All Writs Act, 28 U.S.C. § 1651 (a); the Clayton Act, §§ 18 [fol. 283] [§ 7] and 21 (c) [§ 11 (c)], 15 U.S.C.; and the Federal Trade Commission Act, § 45 (a) (1) [§ 5 (a) (1)], and (c) [§ 5 (c)], 15 U.S.C.

This court entered on January 4, 1966, a temporary restraining order herein pursuant to the petition therefor filed by the Commission, in which it was charged that a complaint had been filed by the Commission against the

respondents Dean and Bowman, instituting the administrative proceeding now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean and charging that such agreement and acquisition are in violation of § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45(a) (1).

Said restraining order is still in full force and effect according to its terms and provisions, inasmuch as an emergency petition for preliminary injunction filed by said Commission is pending and unadjudicated at this date.

Dean Foods Company and Bowman Dairy Company, respondents, having filed herein on January 5, 1966 their brief challenging the authority of the Commission to obtain a preliminary injunction against a supposed violation of § 7 of the Clayton Act or § 5 of the Federal Trade Com- [fol. 284] mission Act and asserting that the sole grant of enforcement authority of the Commission is contained in § 11 of the Clayton Act (15 U.S.C. § 21), which section provides only for the issuance of cease and desist orders after a full administrative hearing with review by a court of appeals and the Supreme Court before such orders become final; the court has considered the briefs and arguments of counsel, as well as various references to the records and proceedings in the Congress of the United States, which reveal that in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission.

Inasmuch as no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and inasmuch as we now hold that the Commission did not have authority to institute this proceeding in this [fol. 285] court, It Is Hereby Ordered that the temporary restraining order issued herein is dissolved and the petition filed herein and this proceeding are dismissed.

Elmer J. Schnackenberg, Judge. Latham Castle, Judge. Luther M. Swygert, Judge.

A True Copy:

Teste:

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit.

[fol. 286] Clerk's Certificate to foregoing transcript (omitted in printing).

[fols. 287-288] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

MOTION OF RESPONDENT BOWFUND CORPORATION FOR LEAVE TO SUPPLEMENT THE RECORD BY FILING THE AFFIDAVIT OF GORDON ADAMSON—Filed February 24, 1966
(omitted in printing)

* * * * * * *

[fol. 289] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF GORDON ADAMSON—Sworn to February 8, 1966

GORDON ADAMSON, being first duly sworn on oath, deposes and says as follows:

1. He is the duly elected, qualified and acting Secretary and Treasurer of Bowfund Corporation, an Illinois corporation formerly named and known as Bowman Dairy Company.

2. The documents attached hereto as Exhibits "1" through "10" are true copies of duly executed and effective amendments to the Purchase Agreement entered into between Bowman Dairy Company and Dean Foods Company on December 13, 1965. Each of said amendments was executed and delivered and became effective on the date such instrument bears.

3. At approximately 11:15 A. M. on January 19, 1966 he was notified that the proceedings which had been instituted by the Federal Trade Commission versus Bowman Dairy Company and Dean Foods Company in the United States

Court of Appeals for the Seventh Circuit on December 30, 1965 had then been dismissed by order of said court. At 2:00 o'clock P. M. on said date Bowman Dairy Company tendered performance under the aforesaid Purchase Agreement. Thereupon, officers and attorneys of Bowman Dairy Company and Dean Foods Company proceeded to close the transaction contemplated by the Purchase Agreement and said transaction was then consummated. In the course of the said closing, which he attended, all of the assets covered by the Purchase Agreement were trans-
[fol. 290] ferred to Dean Foods Company by instruments duly executed on behalf of Bowman Dairy Company which included:

a. Deeds, in recordable form, to fifty-one (51) parcels of real estate, being all real estate formerly owned by Bowman Dairy Company or its subsidiaries. During the closing each of said deeds was delivered or forwarded for recording to the county and state to which it pertained.

b. Bills of sale to all personal property of every description formerly owned by Bowman Dairy Company or its subsidiaries other than those assets excluded by the terms of the Purchase Agreement.

c. Instruments, in form suitable for recording in the United States Patent Office, transferring all unexpired trade marks formerly registered in the name of Bowman Dairy Company or its subsidiaries. Immediately following said closing these instruments were forwarded for recording to the United States Patent Office.

d. Endorsed certificates of title to every motor vehicle formerly owned by Bowman Dairy Company or its subsidiaries. Said certificates were duly forwarded to the appropriate officials for each state in which such vehicles had been registered for transfer and relicensing.

e. Other supplemental and corroborating documents to effect the transfer of said assets.

In the course of such delivery, all liabilities of Bowman Dairy Company and its subsidiaries other than those ex-
cluded by the terms of the Purchase Agreement were as-
[fol. 291] sumed by Dean Foods Company through instruments prepared and executed for that purpose. In the course of said closing, Dean Foods Company paid the sum

of Four Million Dollars ($4,000,000.00) in cash to Bowman Dairy Company, which sum of money was deposited in Bowman's bank account on the afternoon of January 19, 1966.

4. On the afternoon of January 19, 1966, immediately following the aforesaid closing, possession of all assets covered by the Purchase Agreement was delivered to Dean Foods Company, including Bowman's route books, customer lists and business files. At that time complete detailed inventories of all such assets, wheresoever located, were commenced. All of such inventories were completed no later than the morning of January 20, 1966. Effective as of the close of business on January 19, 1966 the persons theretofore employed by Bowman Dairy Company to operate its dairy business were removed from Bowman's payroll.

5. By amendment to its articles of incorporation effective as of January 19, 1966, through acceptance for filing on that date by the Secretary of State of Illinois, the name of Bowman Dairy Company was changed to "Bowfund Corporation". A resolution unanimously authorizing that amendment had been approved by the shareholders of Bowman Dairy Company at a special meeting at which more than ninety-seven per cent (97%) of the issued and outstanding shares of the corporation were represented in person or by proxy. At the same shareholders' meeting, [fol. 292] held on January 3, 1966, the Purchase Agreement entered into by and between Bowman Dairy Company and Dean Foods Company on December 13, 1965 was ratified and approved by a unanimous vote of the shareholders.

6. On the morning of Jauary 20, 1966 the $4,000,000.00 in cash which had been paid to it by Dean Foods Company on the previous day was invested by Bowfund Corporation in commercial paper issued by other corporations.

7. He has read the "Opposition of Bowman Dairy Company to Application for Preliminary Injunction" filed with the Clerk of the United States Supreme Court in response to the petition of the Federal Trade Commission presented before The Honorable Justice Clark. The statements made therein are true and correct.

8. The document attached hereto as Exhibit "11" is a true and correct copy of the unaudited balance sheet of

Bowman Dairy Company as of June 30, 1965. Said document was attached to the Purchase Agreement entered into between Bowman Dairy Company and Dean Foods Company on December 13, 1965 as Exhibit "A" to said Purchase Agreement. The following statements are based upon the figures appearing on that balance sheet and in the Purchase Agreement between Bowman and Dean dated December 13, 1965:

a. The book value of the assets sold from Bowman to Dean under the Purchase Agreement was Nineteen Million, Ninety-Six Thousand Eight Hundred Fifty-One Dollars ($19,096,851.00), computed as follows:

[fol. 293]

Total Assets		$26,414,417.00
Assets excluded as per paragraph 1–P		
Cash	$ 2,488,077.00	
U. S. Government Securities	748,501.00	
Marketable Securities	2,909,972.00	
Stated miscellaneous investments	48,140.00	
Installment contract	209,933.00	
Life insurance policies	912,943.00	
		7,317,566.00
Non-Excluded Assets		$19,096,851.00

b. The price which Dean agreed to pay for such assets was Twelve Million Five Hundred Thirty-Eight Thousand Three Hundred Eighty-Four Dollars ($12,438,384.00), computed as follows:

Base Price		$12,000,000.00
Less excluded assets [see a above]		7,317,566.00
		$ 4,682,434.00
Plus excluded liabilities		
Income tax	$ 19,284.00	
Workmen's compensation (per Exhibit N).	175,983.00	
Retirement Agreements	720,000.00	915,267.00
		$ 5,597,701.00
Cash payment		
Plus assumed liabilities		
Total liabilities	$ 7,855,950.00	
Less excluded liabilities	915,267.00	6,940,683.00
Price		$12,538,384.00

c. The book value of the fixed assets sold from Bowman to Dean was Ten Million Three Hundred Eight Thousand Five Hundred Forty-Six Dollars ($10,308,546.00), computed as follows:

[fol. 294]

All assets sold [see a above]		$19,096,851.00
Less current assets sold		
Receivables, less reserves	$ 5,806,267.00	
Inventories at lower of cost or market	2,522,301.00	
Prepaid expenses	459,737.00	8,788,305.00
Book value of fixed assets		$10,308,546.00

d. The price allocable to the fixed assets sold by Bowman to Dean was Three Million Seven Hundred Fifty Thousand Seventy-Nine Dollars ($3,750,079.00), computed as follows:

Total price to be paid [see b above]	$12,538,384.00
Less price allocable to current assets [see c above]	8,788,305.00
Price allocable to fixed assets having a book value of $10,308,546.00	$ 3,750,079.00

For purposes of determining the actual dollar balance owing from Dean to Bowman, all of the foregoing figures are subject to certain adjustments based upon changes from June 30, 1965 to closing and to the purchase price determination by auditors as provided in the Purchase Agreement.

Further affiant sayeth not.

Gordon Adamson.

Subscribed and Sworn to before me this 8th day of February, 1966.

William S. Myers, Notary Public.

[fol. 295] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY, et al.

ORDER ALLOWING CERTIORARI—February 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is placed on the summary calender and set for oral argument on Monday, March 28, 1966.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 208618 644

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 19, 1966.

OPINION BELOW

The court of appeals filed no opinion, other than that contained in its judgment (Appendix A, *infra*, pp. 19–21), which is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1966 (Appendix A, *infra*, pp. 19–21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Trade Commission is authorized and directed to enforce Section 7 of the amended Clayton Act by issuing complaints and, after appropriate hearings, divestiture orders. Any persons or firm against whom such an order is directed may seek judicial review of the order in the federal court of appeals for the circuit in which he resides or does business or in which the violation occurred. The question presented is whether the court of appeals has power under the "all writs" statute (28 U.S.C. 1651(a)) to issue a preliminary injunction preserving the *status quo* pending completion of the proceeding before the Commission.

STATUTES INVOLVED

The pertinent portions of 28 U.S.C. 1651, and of Sections 7 and 11 of the Clayton Act, 15 U.S.C. 18 and 21, are printed in Appendix B, *infra*, pp. 22–24.

STATEMENT

On December 13, 1965, Dean Foods Company and Bowman Dairy Company entered into an agreement (Ex. B)[1] which provided that Bowman would sell to Dean all Bowman plants and equipment, the Bowman name, "the benefit of all relationships with customers and suppliers," all customer and supplier lists, and various other tangible and intangible assets. On De-

[1] The record in this case consists (besides orders) of affidavits and other exhibits filed in support of the pleadings in the court of appeals, this being an original action in that court. The Commission's affidavits and exhibits are here designated "Ex."

cember 22, 1965, the Federal Trade Commission, pursuant to Section 11(b) of the Clayton Act, as amended, 15 U.S.C. 21(b), issued a complaint charging that the agreement violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.[2] The complaint alleged that Dean was approximately the twelfth largest dairy company in the United States, with total sales in 1964 of $73 million, and that Bowman was approximately the eleventh largest dairy company, with total sales in that year of $77 million (Ex. A, pp. 2–3); that in 1964 Bowman was the largest or second largest seller of packaged milk in the Chicago area, "one of the largest markets in the United States for the consumption of packaged milk" (*id.*, p. 5), with 16 percent of all sales in that area, and Dean the third or fourth largest with approximately 7 percent of all such sales; that the four largest dairy companies in the area had a combined market share of more than 40 percent (*id.*, pp. 5–6); and that the effect of Dean's acquisition of Bowman would be to lessen competition substantially, in violation of Section 7 (*id.*, pp. 7–8).

The agreement between Dean and Bowman provided (Ex. B, p. 5) that the transfer of assets thereunder would take place on January 3, 1966 (later extended by the parties to January 10). On December 30, 1965, the Commission filed a petition in the Court of Appeals for the Seventh Circuit seeking an order under 28 U.S.C. 1651(a) enjoining Dean and

[2] And also Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, which proscribes "unfair methods of competition."

Bowman from taking any steps to carry out the agreement pending completion of the Commission's adjudication of its complaint. The petition stated (p. 6) that, "[i]n the circumstances, it is probable that the Federal Trade Commission will enter an order finding a violation" of Section 7, and that "the imminent consummation of this acquisition will prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." (*Id.*, p. 4.)

Attached to the Commission's petition (and to its reply memorandum) were affidavits reciting the factual support for the allegations of the complaint, and alleging that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57 (Ex. I), and that, within the last four months alone, at least four more such firms had gone out of the market—two as a result of acquisitions (Ex. C, p. 4). Furthermore, according to the affidavits, Dean had told the Commission's staff that shortly after it acquired Bowman it would dispose of the latter's retail home delivery milk routes, consolidate the operations of the two companies, and close various Bowman plants (Ex. D, p. 3); in addition, under the agreement Bowman would retain more than 25 percent of its total assets (principally cash and marketable securities), which it would presumably distribute to its stockholders (*ibid.*). Thus, it was alleged, if Dean carried out its plans for the disposition of Bowman's assets, it would be "virtually impossible" to restore Bowman as a "viable independ-

ent company * * *, even though the acquisition be subsequently adjudged unlawful" (*id.*, p. 4).

In its response to the Commission's petition, Dean did not dispute these statements. Dean contended, rather, that Bowman had concluded (1) that unless it could find a purchaser for its operating assets it would have to proceed to liquidate its business, owing to substantial operating losses sustained by it in recent years and (2) that half of its dairy activity in the Chicago area—the operation of retail home delivery routes—was no longer economical in view of supermarket competition. Dean also alleged that it feared it might presently lose its principal supermarket account and that it needed Bowman's supermarket accounts to offset this.

On January 4, 1966, the court of appeals entered a temporary restraining order enjoining the companies from consummating the acquisition until five days after the denial of any injunctive relief. On January 19, 1966, without deciding the merits of the Commission's petition, the court held that it had no power to grant the requested relief (Appendix A, *infra*, pp. 19–21). At the same time that the court dismissed the petition, it also dissolved the temporary restraining order, and three hours later Dean acquired title to Bowman's assets and began taking further steps to effectuate the merger fully. On January 24, 1966, Mr. Justice Clark, on application of the Solicitor General, entered an order staying most changes in the business and operation of Bowman pending decision on the petition for cer-

205-739—66——2

tiorari which the Solicitor General stated he would file on the Commission's behalf. The order directed that this petition be filed by January 31, 1966.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit has held that it does not have the power to issue an order staying a merger pending an administrative proceeding by the Federal Trade Commission to determine the merger's legality. We believe that review of the court of appeals' decision by this Court is, in the circumstances, clearly warranted. First, the issue here is an important one in the Commission's enforcement of Section 7, since, as we show below, the court's ruling if upheld would disable the Commission from effectively proceeding in a significant number of important merger cases. Second, the court of appeals' decision is erroneous and appears inconsistent with the teachings of this Court. Third, the Seventh Circuit's decision in this case is in conflict with the Ninth Circuit's decision in *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311, certiorari denied, 340 U.S. 883.

We emphasize that the only issue presented by this petition is one of judicial power—whether there are *any* circumstances in which a court of appeals may grant the kind of relief here sought. The court of appeals did not reach the question whether, assuming it had power to grant such relief, this was an appropriate case for exercising that power. Accordingly, if this Court decides to review the judgment below, and reverses it, the case will go back to the

court of appeals for a consideration of the merits of the Commission's petition.

1. Section 11(a) of the Clayton Act, as amended, 15 U.S.C. 21(a), gives the Federal Trade Commission[3] authority to enforce the provisions of the Act in all but the regulated sector of the economy. Section 11(b) provides that if the Commission has reason to believe that the Act has been or is being violated, it shall issue a complaint. If the Commission determines after appropriate hearings that a violation has been committed, it is directed to issue a remedial order, which is reviewable in the court of appeals for the circuit in which the party charged resides or does business or in which the violation occurred. Since, as this Court has pointed out (*United States* v. *du Pont & Co.*, 366 U.S. 316, 328–331), ordinarily the only effective remedy in the case of an illegal merger is an order requiring divestiture of the acquired properties, Section 11(b) expressly provides that upon finding a violation of Section 7 the Commission shall issue an order requiring the violator to divest itself of the stock or assets unlawfully held.

However, in the interval between the issuance of the Commission's complaint and the entry of its final order of divestiture, the parties remain free to take any action they wish with respect to the properties of the merging firms—for the issuance of the complaint does not stay consummation of the merger and the Commission has no power to issue a preliminary

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[3] Concurrently with the Department of Justice. See Section 15, 15 U.S.C. 25, and p. 14, *infra*.

injunction or stay *pendente lite*.[4] Thus, unless the Commission can invoke the aid of a court—as it sought to do here—to preserve the *status quo* pending the completion of the proceeding before it, there is nothing to prevent the acquiring firm from so altering the assets of the acquired firm as to make their eventual divestiture, and the restoration of the acquired firm as a viable competitor, impractical to the point of impossibility. This has happened before;[5] although we do not suggest that it is a problem in every case, it is plainly a serious, and not an isolated, obstacle to the effective enforcement of Section 7 by the Commission. The present case graphically illustrates the nature of the problem.

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[4] Even the Commission's final order is not effective until affirmed by a court of appeals or until the time for seeking judicial review has elapsed. However, Section 11(c) empowers the court of appeals, once a petition for review of the Commission's order has been filed with it, to "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

[5] For example, in *Ekco Products Co.*, F.T.C. Docket 8122, affirmed, 347 F. 2d 745 (C.A. 7). Challenged in that case were acquisitions by Ekco of McClintock Manufacturing Company and of part of the assets of Blackman Stamping and Manufacturing Company. After the acquisitions, and before the Commission's proceeding challenging them was completed, the assets acquired from Blackman were sold off, and the most important assets were actually destroyed. As for McClintock, the plant in which its manufacturing facilities had been located at the time of the acquisition was sublet to third parties, and its operations consolidated with Ekco's. The Commission did not attempt to order divestiture of the Blackman assets, and while it did order divestiture of the McClintock assets, its order has not yet been carried out.

Bowman, the acquired company, is the first or second ranking seller of packaged milk in the Chicago area,[6] with a market share of 16 percent. Dean, the acquiring company, ranks third or fourth in that market, with a market share of 7 percent. As a result of the merger, Dean became the leading seller in the market by a substantial margin, and there has been a substantial increase in the concentration of an already highly concentrated market; the 42 percent of sales formerly accounted for by the first four sellers will now, as a result of the merger, be controlled by the first three—and this in a market that has shown a sharp decline in the number of independent competitors (see p. 4, *supra*. These facts clearly demonstrate *prima facie* illegality under the decisions of this Court. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Aluminum Co. of America*, 377 U.S. 271; *United States* v. *Continental Can Co.*, 378 U.S. 441.[7]

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[6] There appears to be no dispute that packaged milk is the relevant line of commerce and the Chicago area the relevant section of the country in which to test the competitive effects of the acquisition.

[7] In rebuttal, Dean asserted below that Bowman is a "failing company" which its own management decided to remove from the market. But the facts alleged by Dean do not bring the case within the limited exception defined in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, and *United States* v. *Diebold, Inc.*, 369 U.S. 654. For the failing-company rule to apply, a defendant must show, first, that the acquired company is in acute danger of imminent bankruptcy, and, second, that the acquiring company is the only available purchaser. Neither was shown here. Bowman was not facing bankruptcy, but had a $10 million earned surplus (Ex. E). And Dean did not show that an alternative purchaser—acqui-

If, as appears likely, the Dean-Bowman merger is found to violate Section 7, effective relief would require that Dean divest the assets acquired in the merger on terms that would re-establish Bowman as a viable firm and effective competitor in the Chicago packaged milk market. If the Commission's order required anything less, "the Government has won a lawsuit and lost a cause" (*International Salt Co.* v. *United States,* 332 U.S. 392, 401). However, unless the companies are enjoined from going forward with their present plans to dismember Bowman, it appears that the necessary relief could not possibly be obtained. Dean does not deny the Commission's allegations that it will shortly consolidate the operations of the two companies and close various Bowman plants. The result of these steps will be the complete destruction of Bowman as a going concern under circumstances making it impossible, as a practical matter, to reconstitute it at some later time as an independent competitor.

Hence it is urgently necessary to enjoin dismemberment of Bowman pending the administrative proceeding to determine the legality of the merger. As noted earlier, such wholesale dismemberment of acquired firms is not unique in the experience of the Commission, and it poses a recurrent problem of major dimensions to the Commission in its enforcement of the merger law. Thus there can be, we think, little doubt

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sition by whom would not have such serious anti-competitive effects as the Dean-Bowman merger—was not available. On the contrary, the existence of at least one other potential purchaser was shown by an affidavit of that firm (Ex. F).

of the importance of the question presented here; the more difficult question is whether the courts of appeals have the power invoked by the Commission.

2. No statute in terms authorizes a court of appeals (or any other tribunal) to issue, in advance of a final Commission order in a Section 7 case, a stay or injunction designed to assure that the Commission's ability to enter an effective remedial order will not be defeated by action of the parties to the merger *pendente lite*. However, we think the courts of appeals have the power to issue such a stay under 28 U.S.C. 1651(a), which empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

It is well established in the decisions of this Court that, even in the absence of an express statutory grant, there is, by virtue of Section 1651(a), "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671, n. 22.[8] Courts of appeals, of course, have this power. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4; *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 425.[9]

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[8] In so saying, the Court in *Arrow* cited the *Transamerica* decision of the Ninth Circuit, which, as we point out below (pp. 15–17), is directly contrary to the Seventh Circuit's decision in this case.

[9] In *Whitney*, too, the Court cited *Transamerica* with approval. See n. 8, *supra*.

And since an order under Section 1651(a) may be issued in advance of the final order of the lower court or agency (*Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *McClellan* v. *Carland*, 217 U.S. 268), a court having potential appellate jurisdiction may, at the request of the government agency involved, issue an injunction preserving the *status quo* pending final determination by the agency for the purpose of ensuring that the agency will be able to enter an effective order reviewable by the court. *Public Utilities Commission* v. *Capital Transit Co.*, 214 F. 2d 242 (C.A. D.C.); *West India Fruit & S.S. Co.* v. *Seatrain Lines*, 170 F. 2d 775 (C.A. 2); cf. *United States* v. *Parrott*, 27 Fed. Cas. 416, 423 (No. 15998, C.C.N.D. Cal.); *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568 (C.C.S.D. Cal.).

These decisions, and the principles underlying them, clearly support the court of appeals' jurisdiction to grant the relief requested by the Federal Trade Commission in this case. The Court of Appeals for the Seventh Circuit is one of the courts to which a Commission order of divestiture could be appealed.[10] And the contemplated actions of the parties to the merger, unless enjoined by the court, could well defeat or impair that jurisdiction, since if the parties took steps which made divestiture impractical or impossible, it is apparent that the Commission could not enter a fully effective remedial order. In these circumstances, an order enjoining the parties to the merger from alter-

[10] Both parties to the merger reside and do business within the Seventh Circuit and the alleged violation occurred there. See Section 11(c) of the Clayton Act, as amended, 15 U.S.C. 21(c).

ing the *status quo* in order to prevent irreparable injury to the public interest would clearly be an "appropriate" measure in aid of the court of appeals' appellate jurisdiction,[11] and, in light of the decisions we have cited, a settled equity usage as well.

The court of appeals disputed none of the foregoing propositions. It based its dismissal of the Commission's petition largely on Congress' failure to act upon proposals for new legislation which would have expressly authorized interim relief against mergers challenged by the Commission. But legislative inaction of this sort is not a reliable indication of the existing state of the law. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 17. It is especially unreliable here, for the proposals before Congress differed in significant respects from the position urged in this case on the basis of Section 1651(a).[12]

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[11] A writ in aid of jurisdiction is appropriate not only to prevent literal ouster of such jurisdiction but, equally, to prevent its impairment by any change in the *status quo* which substantially lessens the effectiveness of the ultimate judgment. *E.g.*, *Continental Ill. Nat. Bank* v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648, 675; *Looney* v. *Eastern Texas R.R.*, 247 U.S. 214, 221.

[12] The bills in the 84th Congress, H.R. 9424, S. 3341 and S. 3424, involved a requirement that corporations notify the Commission prior to any merger; in the event that the Commission disapproved the merger, the bills would have permitted the Commission then to apply to the district courts for temporary restraining orders and preliminary injunctions. The bills in the 89th Congress, H.R. 49 and H.R. 1574, would have permitted the *Commission* to issue temporary cease-and-desist orders in all cases. Neither type of bill would authorize the Commission to seek relief from a court of appeals having potential jurisdiction of the Commission's proceeding, as under Section 1651(a).

Nor does the scheme of enforcement established by Congress in the Clayton Act indicate any purpose to curtail the courts of appeals' authority under Section 1651(a). While under Sections 15 and 16 of the Clayton Act, 15 U.S.C. 25 and 26, the district courts are authorized to grant preliminary relief in actions brought by the Department of Justice or by private parties to prevent or restrain violations of the Act, no inference can be drawn from this grant of authority that the courts of appeals were to be denied their historic powers under Section 1651(a) in cases brought by the Federal Trade Commission.[13] Had there been no Section 15 or 16, the only enforcement provision in the Act would have been Section 11 (15 U.S.C. 21), which authorizes various regulatory agencies (including the Federal Trade Commission) to enforce the Act administratively. It was in order to give the district courts concurrent jurisdiction with those agencies to enforce the antitrust laws that Congress included Sections 15 and 16. Far from being designed to oust the Federal Trade Commission from any jurisdiction in respect to the Clayton Act, these sections were intended only to confer standing on the Department of Justice and private litigants to bring antitrust cases under that Act.

[13] We also think it would be improper to draw such an inference from Section 13 of the Federal Trade Commission Act, 15 U.S.C. 53, which empowers the Commission to seek a preliminary injunction in the district court against certain false advertisements. This provision was added many years after the original Clayton Act to deal with the special problem of misrepresentation in the promotion of food, drugs, cosmetics, and therapeutic devices.

Surely it would be anomalous for the availability of relief *pendente lite* to depend on whether suit under the Act was brought by the Department of Justice or the Federal Trade Commission. Congress, which made careful and deliberate provision for vesting concurrent responsibility for enforcing the provisions of the Clayton Act in the two agencies,[14] cannot reasonably be thought to have intended to create a huge disparity in the enforcement capabilities of the agencies by denying the Commission all possibility of ever obtaining a preliminary injunction. Before such an anomalous result should obtain, there would have to be an explicit affirmative indication that Congress so intended. *Scripps-Howard Radio, Inc., supra.*

3. The same position urged by the Commission in the court of appeals here, and rejected by that court, was adopted by the Court of Appeals for the Ninth Circuit in *Board of Governors* v. *Transamerica*

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[14] See, *e.g.*, *Trade Comm'n* v. *Cement Institute*, 333 U.S. 683, 692–693; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 310, n. 13; *United States Alkali Assn.* v. *United States*, 325 U.S. 196, 208–209. Under the informal arrangements between the agencies, the Federal Trade Commission has primary responsibility for enforcing Section 7 in (among others) the dairy industry. The Commission has brought and tried a number of dairy merger cases, and in its recent decision in one of them, *Beatrice Foods Co.*, Docket 6653, has laid down comprehensive guidelines to merger legality in the industry. The experience accumulated by the Commission in such cases would largely be wasted, and the division of responsibility between the Commission and the Department of Justice impaired, if the Commission were unable to proceed effectively in dairy cases, like that at bar, where there is an urgent need for preliminary relief against the merger.

Corp., 184 F. 2d 311, certiorari denied, 340 U.S. 883. In that case, the Federal Reserve Board, pursuant to its enforcement duties under Section 11 of the Clayton Act,[15] issued a Section 7 complaint challenging a stock acquisition, and applied to the court of appeals for a preliminary injunction to preserve the *status quo* pending completion of the Board's proceeding by prohibiting the bank from using its stock control to acquire the assets of the acquired bank. Since, under the law as it existed prior to the 1950 amendments to Sections 7 and 11 of the Clayton Act, the Federal Reserve Board did not in all circumstances have power to order divestiture of acquired assets (see *Arrow-Hart & H. Co.* v. *Federal Trade Commission*, 291 U.S. 587, 599), the effect of the proposed transfer of assets to the acquiring company might have been to prevent the Board from entering an effective remedial order with respect to the challenged stock acquisition.

Comparing the situation before it to that of a court confronted by a threat to destroy or remove "a *res in custodia legis*" (184 F. 2d at 315), the court of appeals held that it had the power under Section 1651 (a) to issue, and that it should, in the circumstances, issue, an injunction against the consummation of the merger to protect its appellate jurisdiction over the yet-to-be-issued final order of the Board. The *Transamerica* decision thus affirmed the proposition rejected by the court of appeals in this case—that the review-

[15] Section 11 directs the Federal Reserve Board to enforce the Act against banks, under the same procedures applicable to the Trade Commission.

ing court may enter an order against a merger allegedly in violation of Section 7 of the Clayton Act in order to prevent changes from being made to the acquired company that would thwart effective relief at the close of the administrative proceeding.

To be sure, the conduct enjoined in *Transamerica*—the transfer of the acquired firm's assets to the acquiring firm—threatened to prevent the Board from entering, not merely an effective order, but any order. We do not consider this difference between the cases to be crucial, however, since it is settled that an injunction may issue under Section 1651(a) to protect the reviewing court's jurisdiction from impairment as well as total ouster (see p. 13, n. 11, *supra*). In practical terms, there seems no difference between a wholly inadequate order and no order at all. In principle, too, the basic issue in *Transamerica* and the present case is the same—whether there are any circumstances in which the Board or Commission may obtain a preliminary injunction against the effectuation of a merger pending the administrative proceeding on the agency's complaint. Thus it is that in *Federal Trade Commission* v. *International Paper Co.*, 241 F. 2d 372, a case identical to that at bar, the Second Circuit, in holding against the Commission, acknowledged a conflict with the view of the Ninth Circuit in the *Transamerica* case.

CONCLUSION

The decision below involves an important question of judicial power to act in an area where courts and agencies play a complementary role. There is a con-

flict among circuits on a question that bears directly on the Federal Trade Commission's power to carry out its role effectively in the enforcement of the antitrust laws. We believe that the decision below also conflicts with views expressed by this Court. The petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
RICHARD A. POSNER,
Assistants to the Solicitor General.

JAMES McI. HENDERSON,
General Counsel,
JAMES B. TRULY,
Assistant General Counsel,
RICHARD H. STERN,
Attorney,
Federal Trade Commission.

JANUARY 1966.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Circuit Judges ELMER J. SCHNACKENBERG, LATHAM CASTLE, and LUTHER M. SWYGERT

No. 15493

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY, RESPONDENTS.

ORDER

Federal Trade Commission, petitioner herein, filed its petition in this court on December 30, 1965 praying for a preliminary injunction, a temporary restraining order and other relief in aid of the jurisdiction of this court, under 15 U.S.C. §§ 21(c) and 45(c), to review final orders of the Federal Trade Commission, and therein represented to this court that the question presented was "whether this Court should exercise its discretion to grant equitable relief to preserve the status quo *pendente lite*, where the respondents will imminently consummate a merger (1) which will probably violate the antitrust laws, and (2) against which the Commission's ability to enter an effective order will probably be seriously impaired, unless the respondents are appropriately restrained by this court."

According to petitioner, the statutes involved are: the All Writs Act, 28 U.S.C. § 1651(a); the Clayton Act, §§ 18 [§ 7] and 21(c) [§ 11(c)], 15 U.S.C.; and the Federal Trade Commission Act, § 45(a)(1) [§ 5(a)(1)], and (c) [§ 5(c)], 15 U.S.C.

This court entered on January 4, 1966, a temporary restraining order herein pursuant to the petition therefor filed by the Commission, in which it was charged that a complaint had been filed by the Commission against the respondents Dean and Bowman, instituting the administrative proceeding now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean and charging that such agreement and acquisition are in violation of § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45(a)(1).

Said restraining order is still in full force and effect according to its terms and provisions, inasmuch as an emergency petition for preliminary injunction filed by said Commission is pending and unadjudicated at this date.

Dean Foods Company and Bowman Dairy Company, respondents, having filed herein on January 5, 1966 their brief challenging the authority of the Commission to obtain a preliminary injunction against a supposed violation of § 7 of the Clayton Act or § 5 of the Federal Trade Commission Act and asserting that the sole grant of enforcement authority of the Commission is contained in § 11 of the Clayton Act (15 U.S.C. § 21), which section provides only for the issuance of cease and desist orders after a full administrative hearing with review by a court of appeals and the Supreme Court before such orders become final; the court has considered the briefs and arguments of counsel, as well as various references to the records and proceedings in the Congress of

the United States, which reveal that in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission.

Inasmuch as no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and inasmuch as we now hold that the Commission did not have authority to institute this proceeding in this court, IT IS HEREBY ORDERED that the temporary restraining order issued herein is dissolved and the petition filed herein and this proceeding are dismissed.

ELMER J. SCHNACKENBERG,
Judge.

LATHAM CASTLE,
Judge.

LUTHER M. SWYGERT,
Judge.

A True Copy:
Teste:
KENNETH J. CARRICK,
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
JANUARY 19, 1966

APPENDIX B

STATUTES INVOLVED

Section 1651(a) of the Judicial Code, 28 U.S.C. 1651(a), provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, provides in pertinent part:

> (a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board

where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or

rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the maner and within the time fixed by said order. * * *

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 970

FEDERAL TRADE COMMISSION,
Petitioner,

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY,
Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENT BOWFUND CORPORATION IN OPPOSITION

OPINION BELOW

The orders entered by the court of appeals are not reported.

JURISDICTION

The order of the court of appeals dismissing the emergency petition of the Commission was entered on January 19, 1966. The jurisdiction of this Court was invoked by the Federal Trade Commission on January 20, 1966, by the filing of its application for preliminary injunction. The statutory basis for that application has not been identified

by the Commission. The jurisdiction of this Court is now invoked by a petition for a writ of certiorari filed on January 31, 1966, pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 7 of the Clayton Act, as amended, provides, in part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ." 15 U.S.C. 18.

Section 11(b) of the Clayton Act provides, in part:

> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, ... If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. . . ." 15 U.S.C. 21(b).

Section 11(c) of the Clayton Act provides, in part:

> "To the extent that the order of the commission or board is affirmed, the Court shall issue its own order commanding obedience to the terms of such order of the commission or board. . . ." 15 U.S.C. 21(c).

Section 15 of the Clayton Act provides, in part:

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. . . ." 15 U.S.C. 25.

The "All Writs Act" provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission has been authorized by Congress to initiate a proceeding in the court of appeals to obtain equitable relief against a threatened violation of Section 7 of the Clayton Act.

2. Whether, prior to the entry of a final order by an administrative agency which is currently proceeding under

Section 11(b) of the Clayton Act, a court of appeals has jurisdiction under 28 U.S.C. 1651(a) to issue interlocutory orders in order to make it less difficult for the agency to devise an effective remedy when neither the jurisdiction of the agency nor the potential jurisdiction of the court has been threatened.

3. Whether this Court should review the narrow jurisdictional question presented by the petition for certiorari when it is manifest that the exercise of equitable jurisdiction by the court below would constitute such a departure from the accepted and usual course of judicial proceedings as to constitute an abuse of discretion and require reversal by this Court.

STATEMENT

For years Bowman Dairy Company ("Bowman") was the largest dairy in the Chicago area. It also operated, through subsidiaries, in other markets in the midwest, but over half its business was conducted in the Chicago market. In that market Bowman has been suffering operating losses of approximately one million dollars per year, and its sales volume, historically based largely on retail home delivery routes, has been steadily declining.[1]

The modest profits derived from some of the other markets were not sufficient to offset the losses in Chicago. On a company-wide basis, Bowman was obtaining a plainly inadequate return on its invested capital. After long and careful deliberation, the directors and stockholders of Bowman decided to discontinue dairy operations. Alternative courses of action were considered and investigated through the past three years.[2]

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[1] See Kullman Affidavit. The affidavits referred to herein are incorporated in the appendix filed by respondents in the court of appeals except the Adamson affidavit which Bowfund proposes to file with this brief.

[2] See affidavits of Kullman, Clark, Turner and Bowman.

On December 13, 1965, Bowman entered into an agreement to sell its operating assets to Dean Foods Company ("Dean") on January 3, 1966.[3] Those assets had a book value, as of June 30, 1965, of $19,096,851. The price which Dean agreed to pay for those assets (subject to adjustments based on transactions up to the closing date) was $12,538,384.[4] If it is assumed that Bowman's current assets had an actual value substantially equal to their book value,[5] the agreement provided for a sale by Bowman of fixed assets having a book value of $10,308,546, for a purchase price of $3,750,079.[6] Neither the agreement nor Bowman's books and records assigned any value to goodwill, going concern value, or other intangibles.

By a series of written amendments to the contract, the closing date was postponed until 2:00 o'clock P.M. on January 19, 1966. The proceedings in the court of appeals having terminated at approximately 11:15 A.M. on that day, Bowman tendered performance under the contract and the transaction was closed at 2:00 o'clock P.M. The operating assets formerly owned by Bowman are now owned by Dean, and all operations since the closing date have been conducted under Dean's supervision and direction and at Dean's risk. (See Adamson affidavit).

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[3] Exhibit B to emergency petition.

[4] See Adamson Affidavit. Of this amount $5,597,301 was payable in cash, and $6,940,683 by the assumption, on the closing date, of Bowman's liabilities. These figures are based on the June 30 statement, and, as with respect to the asset values and aggregate price, are subject to adjustment based on an audit of Bowman's net worth as of the closing date.

[5] This is a reasonable assumption since inventories are to be valued at the lower of cost or market, prepaid items consist largely of insurance and other payments which are equally valuable to the purchaser, and the book value of the accounts receivable is computed after giving effect to the allowance for doubtful accounts deemed adequate by independent Certified Public Accountants.

[6] See Adamson Affidavit.

The assets which Dean has acquired are described in detail in the closing documents or in the books and records which were delivered at the closing (See Adamson affidavit). Parcels of real estate are described by legal description contained in recorded deeds, vehicles by title and license registrations, items of machinery and equipment may be identified by serial number and property ledger accounts, trade names and trademarks by registration numbers and other descriptions, and the names and addresses of Bowman's former customers are reflected in route books and other sales records. The assets which Dean has acquired can easily be identified if such identification should ever be necessary.

Immediately after the closing Bowman's corporate name was changed and the proceeds of sale were invested (Adamson affidavit).

Description Of The Litigation

Four separate proceedings have been commenced by the Federal Trade Commission:

1. On December 22, 1965, the Commission issued its complaint under Section 11(b) of the Clayton Act, 15 U.S.C. Section 21(b), alleging that the acquisition of Bowman's assets by Dean may substantially lessen competition in violation of Section 7 of the Clayton Act. The complaint contains no prayer for relief. That proceeding is presently pending before the Federal Trade Commission and presumably will go forward before the Commission and ultimately the court of appeals, in normal fashion.

2. On December 30, 1965, the Commission filed its Emergency Petition for a preliminary injunction and other relief in the court of appeals. The allegations of the Petition set forth the reasons why it will allegedly be "extremely difficult for the Commission to devise any effective remedy after its decision on the merits" unless an injunction is

issued by the court. In the opinion of the Commission, as explained in affidavits attached to the Emergency Petition, it is "difficult" for the Commission to order effective divestiture.[7] Moreover, as the Commission states in paragraph 10 of its Emergency Petition: "The Federal Trade Commission is without jurisdiction to prevent the destruction of Bowman as a viable independent entity." The Emergency Petition does not describe the nature of the order the Commission would enter at the conclusion of the Commission proceedings if a violation should be found.

The Emergency Petition prayed for the entry of (a) a temporary restraining order during the pendency of the matter in the court of appeals, (b) a preliminary injunction restraining the closing until after the conclusion of all proceedings before the Commission, and (c) such other and further relief as might be appropriate.

On January 4, 1966, the court of appeals entered the temporary restraining order requested by the Commission. Oral arguments, based on the Emergency Petition, affidavits submitted by the parties and the written briefs, were made on January 7, 1966.

On January 19, 1966, the court of appeals dismissed the Emergency Petition and dissolved the temporary restraining order. In a unanimous opinion, the court held that Congress had not authorized the Federal Trade Commission to apply to the Court of Appeals for the relief requested in the Emergency Petition. The Court pointed out

[7] "It has been my experience that effective divestiture relief in merger cases is always difficult." Page 2 of affidavit of Harry Bender attached to the Emergency Petition as Exhibit D. Mr. Bender states that it is "difficult" to locate satisfactory purchasers and that the working out of satisfactory divestiture arrangements has been "extremely difficult." His conclusions are based on references to certain conglomerate merger cases which are quite unlike the facts of the present case.

that Congress had considered and rejected legislative proposals to confer such authority upon the Commission.

3. On January 20, 1966, the day after the closing, the Commission presented its application for a preliminary injunction to Mr. Justice Clark. Pursuant to that application, Mr. Justice Clark entered an order restraining any material changes in the acquired assets. The order provides, however, that Dean may dispose of retail milk routes in Chicago on certain conditions. That order remains in effect pending the disposition of the certiorari petition.

4. On January 31, 1966, the Commission filed its petition for a writ of certiorari in this Court. The petition presents only the narrow question of jurisdiction of the court of appeals under the All Writs Act. This question was not reached by the court below, which merely held that the Commission did not have authority to institute the proceeding in that court. Moreover, the petition urges the Court *not* to consider whether, as a matter of discretion, jurisdiction under the All Writs Act should be exercised in a case of this character.

ARGUMENT

I.

THE QUESTION PRESENTED DOES NOT HAVE THE IMPORTANCE ASCRIBED TO IT BY THE COMMISSION.

The Commission contends that the ruling of the court below is important because, if upheld, it "would disable the Commission from effectively proceeding in a significant number of important merger cases." (Cert. Pet. 6)

For over 50 years the Commission has had authority to order divestiture as a remedy for a violation of Section 7 of the Clayton Act. Divestiture has been called the most important of antitrust remedies. "It is simple, relatively easy to administer and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *United States* v. *DuPont & Co.*, 366 U.S. 318, 331. The ruling of the court below does not disable the Commission from entering a divestiture order if the facts warrant such relief, or indeed any relief in this case. Nor does it disable the Commission from continuing to proceed effectively with the enforcement of Section 7, and continuing to enter divestiture orders in appropriate cases, as it has for many years.[8] It merely prevents the Commission from

[8] The Commission suggests that the importance of the question is illustrated by difficulties which it encountered in obtaining adequate relief in *Ekco Products* v. *Federal Trade Commission*, 347 F.2d 745 (C.A. 7) (Cert. Pet. p. 8, note 5; also Cert. Pet. p. 10). The court of appeals opinion in that case, however, describes the relief which the Commission did obtain as "rather harsh" (p. 753), and the factual situation as "narrow and somewhat unique" (p. 751); "narrow" (p. 753); and again as "unique" (p. 753). The Blackman assets which had been "sold off" were simple dies worth about $40,000 which could easily have been replaced. If the *Ekco* case presents the strongest illustration the Commission can find to demonstrate its need for extraordinary judicial assistance, the Commission's problems are not very serious.

extending its authority beyond the bounds within which it has functioned in the past.

In the exceptional case in which equitable relief, other than a simple divestiture order, may be appropriate, Congress has provided a completely adequate remedy to be pursued by the Attorney General. The question whether such exceptional proceedings may only be instituted by the Attorney General, or in addition should also be available to a second representative of the public, is hardly an issue of overriding importance in the administration of justice. The issue involves considerations relating to allocations of work and the budgets of the respective branches of the Government. Such considerations are properly the concern of the executive and legislative departments; they are not the type of considerations which should motivate this Court to grant certiorari. Those considerations were no doubt reviewed carefully by Congress when it declined to grant the Federal Trade Commission the type of authority which it seeks to assert in this litigation.

The desire of the agency for a duplication of enforcement authority and responsibility does not present an important question of law which should now be settled by this Court. As a practical matter, the question has been settled for years by unequivocal manifestations of the intent of Congress.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM v. TRANSAMERICA CORPORATION.

The extraordinary writ issued by the Court of Appeals for the Ninth Circuit against Transamerica in 1950

prevented a total ouster of the agency's jurisdiction to continue administrative hearings which had commenced approximately two years earlier. 184 F. 2d 311, *cert. den.*, 340 U.S. 883. The hearings were being held on a complaint brought by the Board of Governors of the Federal Reserve System in 1948 challenging the legality under Section 7 of the Clayton Act of certain stock acquisitions which had taken place some time previously. No attempt was made, either at the outset of the administrative proceedings or at any later date, to enjoin any threatened violation of law.

At the time of those proceedings, which preceded the amendment making Section 7 applicable to asset acquisitions, it was possible for the respondents to oust the enforcement agency's jurisdiction by disposing of the assets of the acquired corporation. See 184 F. 2d at p. 316 and cases cited. The writ which was issued by the court of appeals pursuant to 28 U.S.C. 1651(a) prevented the respondents from completely defeating the jurisdiction of the Board, as well as the potential jurisdiction of the court of appeals to review the final order of divestiture which was subsequently entered by the Board.

In his brief in opposition to the petition for certiorari filed by Transamerica in this Court, the then Solicitor General of the United States stated the principal question presented as follows:[9]

> "1. Whether, prior to the entry of a final order by an administrative agency which is currently proceeding under Section 11 of the Clayton Act, a court of appeals has jurisdiction under 28 U.S.C. 1651 *to prevent ouster of its ultimate and exclusive jurisdiction to enforce and review final orders of administra-*

[9] The certiorari petition in *Transamerica* also presented questions which arose out of the parties' contemptuous defiance of the court's order. See Petition for Certiorari at p. 4.

tive agencies under the Clayton Act." (Emphasis added.) *Transamerica Corporation, et al., Petitioners,* v. *Board of Governors of the Federal Reserve System,* Nos. 322, 323, O.T., 1950, Brief for Respondents at p. 2.

The questions presented here are entirely different. There is no doubt that the Commission's jurisdiction to proceed with its hearings will survive these court proceedings, that if it finds a violation of law it will have power to enter an order requiring divestiture of the assets acquired by Dean from Bowman, and that the court of appeals and this Court will thereafter have jurisdiction to review such an order. No question is involved of preserving the jurisdiction of the agency or of the courts. On the contrary, the Commission's entire position is predicated on an allegation that it needs the assistance of the court of appeals in devising an effective remedy.

The opinion of the Court of Appeals for the Ninth Circuit in the *Transamerica* case did not even consider the question decided by the court below. The court below held that the Federal Trade Commission did not have authority to apply to the courts of appeals for a remedy not contemplated by Section 11 of the Clayton Act. It, therefore, did not have occasion to consider the scope of its own powers under Section 1651(a). On the other hand, the opinion in *Transamerica* did not consider the authority of the Federal Reserve Board to initiate judicial proceedings other than those described in Section 11 of the Clayton Act.[10]

The fact that the Court of Appeals for the Second Circuit in *Federal Trade Commission* v. *International Paper Co.,*

[10] *Transamerica* contended that the Board's authority under Section 11 was limited to enforcement of Section 8 of the Clayton Act and did not include enforcement of Section 7. This, of course, is a different contention from the point made here, namely, that since Section 11 prescribes the procedure to be followed by the agency, that procedure is exclusive.

241 F. 2d 372, stated its disagreement with the conclusion of the Ninth Circuit in *Transamerica*, certainly does not create a conflict between the ruling below and *Transamerica*.

The *International Paper* case is of interest for different reasons. It points out that the Court of Appeals for the Second and Third Circuits have reached the same conclusion as the court below. Moreover, it demonstrates that the emergency allegations of the Commission must be interpreted in the light of the fact that the Commission is appearing as a litigant rather than an administrative agency which has entered an appropriate order after the conclusion of hearings before an impartial examiner. For there, as here, the Commission alleged that immediate relief was urgently required because if the transaction were permitted to close, it would become "impossible"[11] to order divestiture later on. As a matter of history, after the Second Circuit rejected the Commission's plea of emergency, the matter went forward before the agency according to established procedures and ultimately ended with the entry of divestiture orders. See 53 FTC 1192 (1957); 56 FTC 1671 (1960).

III.

THE COURT OF APPEALS CORRECTLY HELD THAT CONGRESS HAS NOT AUTHORIZED THE FEDERAL TRADE COMMISSION TO PETITION THAT COURT FOR INTERLOCUTORY RELIEF IN ORDER TO MAKE IT LESS DIFFICULT FOR THE COMMISSION TO DEVISE AN EFFECTIVE REMEDY AGAINST AN ALLEGED VIOLATION OF SECTION 7 OF THE CLAYTON ACT.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies

[11] Actually, in this case the Commission uses the term "extremely difficult" rather than the term "impossible" which it used in *International Paper*.

embodied in statutes in accordance with the legislative standards therein prescribed, and to perform other specified duties as a legislative or judicial aid. *Rathbun* v. *United States*, 295 U.S. 602, 628. The legislative standards limit the powers of the President in dealing with the Commission and necessarily also limit the powers of the Commission itself. The authority of the Commission to initiate judicial proceedings, whether ordinary or extraordinary in character, must be found in the statutes creating the agency and defining its powers. *Federal Trade Commission* v. *Eastman Kodak*, 274 U.S. 619, 623; *Cf. Peters* v. *Hobby*, 349 U.S. 331, 345.

The All Writs Act, 28 U.S.C. 1651(a), contains no grant of authority to the Federal Trade Commission or to any other administrative agency. That statute in terms grants authority only to this Court "and all courts established by Act of Congress." The Commission is not a "court."

The proceedings which the Commission is authorized to initiate are described in detail in various statutory provisions, none of which includes an original application to a court of appeals for equitable relief against an alleged threatened violation of Section 7 of the Clayton Act.[12]

The relief which the Commission is authorized to obtain if a violation of Section 7 of the Clayton Act is found to have occurred is set forth in Section 11(b) of that Act. That section authorizes the Commission to order divestiture of the acquired stock or assets. It does not authorize the Commission to seek or obtain general equitable relief. When Congress intended to grant such authority in Section 7 litigation, it did so clearly and unequivocally; but

[12] With reference to equitable relief, the Commission has been granted specific authority under Section 13 of the Federal Trade Commission Act (15 U.S.C. 53) to enjoin false advertising; in addition, the Commission may seek injunctive relief from the district courts to prevent violation of the Textile Fiber Products Identification Act, the Fur Products Labeling Act, the Wool Products Labeling Act, and the Flammable Fabrics Act. See 15 U.S.C. 68(e), 69(g), 70(f) and 1195.

the grant was to the Attorney General, not to the Commission.[13]

The relief which the Federal Trade Commission is authorized to seek in a court of appeals is also described in the statutes. With certain exceptions specifically defined,[14] the only relief which the Commission may obtain in that court is enforcement of an order which the Commission itself has the power to enter. *Federal Trade Commission* v. *Eastman Kodak, supra* at 623-4. The Commission may order divestiture and may petition the court of appeals for enforcement of the divestiture order.

The Commission, however, is not authorized to enter interlocutory orders granting equitable relief.[15] It has no power to order the Bowman assets to be preserved as a "viable independent entity." This lack of power is expressly acknowledged by the Commission at page 7 of its Emergency Petition. It is submitted that the Commission does not have the power to petition a court of appeals for the entry or enforcement of a remedial order which is broader than the Commission itself has power to enter.

The allegations of the Petition relating to the difficulties which the Commission may encounter in devising an effective remedy if a violation is ultimately found cannot add

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[13] Section 15 of the Clayton Act (15 U.S.C. 25) authorizes the Attorney General "to institute proceedings in equity, to prevent and restrain such violations" and empowers the district courts to enter such orders "as shall be deemed just in the premises."

[14] Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c) and Section 11(c) of the Clayton Act, 15 U.S.C. 21(c) authorize the Commission to petition a court of appeals to "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." However, under both statutes, such writs can only be issued *after* the record has been filed for review of a cease and desist order.

[15] In the petition for certiorari, at pp. 7-8, the Solicitor General acknowledges that ". . . the Commission has no power to issue a preliminary injunction or stay *pendente lite*."

to the powers delegated to the Commission by Congress.[16] The Commission's premature assertion of a right to judicial relief "is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51.

The doctrine requiring the exhaustion of administrative remedies is not normally invoked against the agency itself. But the orderly and economic administration of justice which underlies the doctrine is as important to the private litigant as to the agency. An agency should not be permitted to circumvent its own regular procedures by asserting that an anticipated defense is groundless, or that the remedy authorized by Congress may be inadequate.[17] The agency should be required, as private litigants are, to follow the procedures authorized by the relevant statutes and its own regulations.[18]

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[16] The remedy chosen by Congress is binding upon both the agency and the court, even if the agency feels that Congress has chosen the wrong way to accomplish its aim. *N.L.R.B.* v. *Radio & Telev. Broadcast Eng. Union*, 364 U.S. 573, 583.

[17] See *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, and cases cited, at p. 51.

[18] In this regard, the provisions of the Administrative Procedure Act, 5 U.S.C. 1001, et seq., are relevant. Section 1002 of that Act requires every administrative agency to "separately state and currently publish in the Federal Register . . . the nature and requirements of all formal or informal procedures available. . . . No person shall in any manner be required to resort to . . . procedures not so published." *Cf., United States* v. *Morton Salt Co.*, 338 U.S. 632, 643. The Federal Trade Commission has published the rules of procedure available to it, and they do not include the relief requested here. See 16 C.F.R. Chapter 1, Subchapter A, 28 F.R. 7080, as amended 30 F.R. 8216. Those rules specifically set forth the sole instances in which the Commission may request the Court to issue "such writs as are ancillary to its jurisdiction." In terms, such relief may be obtained only when the Court of Appeals has obtained jurisdiction to review a cease and desist order. See Federal Trade Commission, Organization, Procedure and Rules of Practice, August, 1963, Subpart K, Section 1.112.

The Commission's request for additional remedial powers should be addressed to Congress, not to the judiciary.

IV.

THE ANSWER TO THE QUESTION PRESENTED BY THE PETITION FOR CERTIORARI IS PLAINLY INDICATED BY THE DECISIONS OF THIS COURT CONSTRUING THE ALL WRITS ACT.

The court of appeals did not reach the question whether, assuming that the Commission had authority to initiate the proceeding, the court itself had jurisdiction pursuant to Section 1651(a) to grant the equitable relief sought. That question, although not decided below, is the only question presented by the certiorari petition. We believe the question has already been answered by decisions of this Court.

Since a writ issued under Section 1651(a) is an extraordinary remedy reserved for truly exceptional cases, the availability of an adequate alternative remedy, which has not been exhausted by the applicant, bars the use of the writ. *Ex parte Fahey*, 332 U.S. 258, 259-260. It has been repeatedly held that "whatever may be done without the writ may not be done with it." *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383; *Ex parte Rowland*, 104 U.S. 604, 617.

Congress has provided the Commission with an adequate remedy against a threatened violation of Section 7. The Commission is directed by Section 11(b) of the Clayton Act to provide the Attorney General with a copy of every complaint which it issues alleging a violation of Section 7, and the Attorney General has a statutory duty to institute proceedings in equity to prevent and restrain violations of

Section 7 whenever the facts warrant such relief.[19] It must, of course, be presumed that the Attorney General will perform his statutory duty. The "informal arrangments" between the Commission and the Attorney General have not ousted the latter of his statutory power to enforce the Clayton Act against Chicago dairies. See *United States* v. *The Borden Company*, 370 U.S. 460. Certainly such informal arrangements do not excuse the Commission from its obligation to exhaust its alternative remedy before applying for the issuance of an extraordinary writ.

Moreover, the relief sought by the Emergency Petition filed in the court of appeals is fundamentally different from the office which an extraordinary writ was intended to perform. The function of the writ is to confine an inferior tribunal to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245. The issuance of the writ must be "agreeable to the usages and principles of law." See *United States* v. *Hayman*, 342 U.S. 205, 221, note 35. This Court has never sanctioned the use of the writ as a device to expand the jurisdiction of either court or agency as prescribed by statute.

In this case, the basis for the Emergency Petition filed in the court of appeals is an acknowledgement that the Commission itself does not have the power to order the relief which is requested from the Court. Thus, instead of seeking to protect jurisdiction which is otherwise conferred, the Commission seeks to expand the remedial powers of

[19] See 15 U.S.C. Sections 21(b) and 25; 28 U.S.C. Section 507. Since the Assistant Attorney General in charge of the Antitrust Division appears in this Court as counsel for the Commission, it is apparent that the existing spirit of cooperation between the Commission and the Department of Justice will lead to effective prosecution of all Section 7 cases in which preliminary relief is required without resort to the issuance of any extraordinary writs.

both court and agency.[20] The writ is not sought in aid of the Court's jurisdiction within the meaning of Section 1651(a).

V.

IT WOULD BE A MANIFEST ABUSE OF DISCRETION FOR THE COURT OF APPEALS TO ISSUE AN EXTRAORDINARY WRIT IN THIS CASE EVEN IF IT HAS POWER TO DO SO.

The issuance of a writ pursuant to 28 U.S.C. Section 1651(a) is not a matter of right, but of sound discretion to be exercised sparingly.[21] There are compelling reasons why the courts of appeals should not be invited to exercise that discretion in cases of this kind, or in this particular case.

It is not appropriate for the courts of appeals to hear and determine original applications for such writs, in cases of this character. The parties are obviously entitled to a full and fair hearing on any such application. The problems involved in conducting such a hearing are illustrated by the procedures which have been developed for use in the district courts.

An Emergency Petition seeking preliminary injunctive relief is entitled to priority treatment. A temporary re-

[20] If the Commission had obtained an injunction enjoining the sale, there never would have been any occasion for the Commission to order Dean to divest itself of any assets acquired from Bowman. For either the Commission would have found the proposed acquisition lawful (in which event no relief would be appropriate), or else it would have found the proposed transaction unlawful (in which event it presumably would have entered some kind of order designed to make the Court's preliminary injunction permanent). In that event, no assets would ever have been acquired, and there would be nothing to order divested. Thus, the Emergency Petition in reality did not seek a writ in aid of a proposed divestiture order but an entirely new remedy never prescribed by Congress.

[21] See this Court's Rule 30 and cases cited therein.

straining order may be entered on the basis of affidavits, but such an order must be limited in duration.[22] Before it is replaced by a preliminary injunction, the parties are entitled to offer evidence, to subpoena witnesses to testify in their behalf, to cross-examine the witnesses offered by their adversaries, to make objections to the admissibility of evidence submitted to the court, and to present arguments with respect to the form and substance of the injunctive decree, if any. Thereafter, the court is required under Rule 52(a) to enter findings of fact and conclusions of law. After entry of an order,[23] the court retains jurisdiction to consider requests for modification in the light of changed conditions, or to punish violations of the order. For all of these functions the district court is well suited, and its procedures are specified by rule and have been well developed in practice. All of these functions and procedures, however, are inappropriate for courts of appeals.

The procedures and rules in the courts of appeals relate to appellate matters and do not contemplate the kind of work which the Federal Trade Commission is inviting them to undertake.[24] These considerations alone serve as an adequate basis for denying the petition for certiorari.

Moreover, the lack of merit in the Commission's underlying position provides a compelling reason why the Court of Appeals should not have exercised whatever discretion

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[22] See Rule 65 of the Rules of Civil Procedure for the United States District Courts.

[23] Orders granting or denying a preliminary injunction are appealable. See 28 U.S.C. 1292(a)(1).

[24] Although the invitation is extended in a Section 7 case, if the court's legal theory were sound, any matter over which the Commission has jurisdiction might provide the basis for an application to a court of appeals for a writ under Section 1651(a).

it might have had in this case.[25] The relief requested by the Commission here would cause irreparable harm to private parties without any corresponding benefit to the public.

Prior to the acquisition, Bowman was the biggest dairy in Chicago. The Chicago operations were, however, losing money at an alarming rate. Dean proposes to take steps which will (1) materially reduce the size of the Bowman business, and (2) reduce or eliminate the operating losses in Chicago. The Commission, however, wants the court of appeals to enter an order preserving both the size and the unprofitability of the Bowman business. It is urged that this anomalous request is in the public interest because Bowman must, at all costs, be maintained as a "viable independent entity".

The rubric is based on a series of incorrect assumptions. The Commission incorrectly assumes that the remedy of divestiture requires reconstitution of the acquired business, rather than the so-called "dismemberment," or voluntary disposition of various assets which is planned by Dean. Implicit in this assumption is a further assumption that antitrust considerations make it more desirable to restore about 40% of the market to the four largest firms than to permit dismemberment of Bowman and divestiture of the fragments to a variety of purchasers. Such dismember-

[25] We shall not argue the merits of the Commission's complaint. We cannot resist pointing out, however, that the Commission has assumed the impossible burden of proving that the acquisition may adversely affect competition in the Chicago market where Bowman's operations were obviously destined to terminate even if the sale to Dean had not taken place. The facts that Bowman has other operations in other markets and has accumulated cash and securities which it is unwilling to dissipate to subsidize continuing losses in the relevant market have no bearing on the issue of violation. The so-called "failing company doctrine" is merely a recognition of the fact that Section 7 is not violated unless an injury to competition will probably result from the acquisition and that no injury does result when it is obvious that the acquired company would have withdrawn from the relevant market even if the acquisition had not occurred.

ment and piecemeal divestiture would obviously result in a less concentrated market than would the reconstitution of Bowman. For after dismemberment the three leading firms would account for only about 24% of the business. The suggested reconstitution of Bowman is neither necessary nor appropriate to any legitimate antitrust objective.

The Commission also incorrectly assumes that the Bowman business represents a "viable independent entity" which may be divested more easily in its present form than in some different form which may result from Dean's management.[26] If this be true, there must be intangible value to the Bowman business as a going concern; it must have substantial earning capacity in its present form. But the contrary is established by the undisputed facts of record. Bowman's assets were sold for a fraction of their book value. Nothing was paid by Dean for goodwill or other intangibles. The business is losing money. The Commission has cited no precedent for requiring a losing business to continue to suffer losses.

Finally, it should be noted that the Commission's theory with respect to the alleged illegality of the acquisition is inconsistent with its request that the Bowman business be kept intact. Focusing on Chicago, the Commission alleges that a market share of 23% (Dean's 7% plus Bowman's 16%) is unlawful, *and* that Dean should not be permitted to divest itself of approximately one-half of the business acquired from Bowman and thus reduce its size to about 15%. In other words, the Bowman 16% market share must be preserved, but Dean may not have a 15% share. The Commission's position in this litigation is not only novel and extraordinary; it is unsound.

[26] Even if this were true, an extraordinary writ should not be issued just to make it easier for the Commission to order one form of divestiture rather than another.

VI.

THE QUESTION PRESENTED BY THE PETITION FOR CERTIORARI IS TOO VAGUE AND HYPOTHETICAL TO BE DECIDED BY THIS COURT ON THE RECORD BEFORE IT.

The Emergency Petition asked the court of appeals to enter an injunction preventing Bowman from selling its operating assets to Dean until after the conclusion of the hearings before the Federal Trade Commission. However, the event which the Emergency Petition sought to enjoin has now taken place.

The Commission states in its Petition for Certiorari that the question presented to this Court is whether the court of appeals has power "to issue a preliminary injunction preserving the status quo pending completion of the proceedings before the Commission." (Cert. Pet. p. 21)[27]

There is no record before this Court which adequately defines the nature of the particular transactions which the Commission would like to restrain prior to the conclusion of its own proceedings, the specific factual basis establishing the need for any such specific restraints, or the form of order which the Commission seeks to have entered and enforced for the duration of its hearings.

The acquired assets include a large number of operating plants and a variety of other physical assets. Management decisions must be made from day to day on the use and operation of those assets. Inevitably some will be replaced, others will be modified, and still others will be abandoned

[27] The question which the Commission stated that it proposed to present at the time of its application to Mr. Justice Clark for a preliminary injunction was phrased more nearly like the question which had been presented to the court of appeals. In preparing the petition for certiorari, however, the Commission apparently realized that the reference to "consummation of a merger" is inapposite to an assets purchase which has been consummated.

or sold, all in the ordinary course of business. A general command to a going business "to maintain the status quo" for a period of several years is too vague to be meaningful.[28]

The Emergency Petition does not adequately identify any specific relief which the Commission now seeks or the need for any such specific relief. The petition for certiorari, therefore, presents a question which is too hypothetical for review by this Court at this particular time.

CONCLUSION

In due course, if the procedures specified by Congress are followed in this case, the Commission will be able to consider all relevant evidence and determine whether or not any remedy at all is appropriate in this case.

It is respectfully submitted that the litigation in the court of appeals, and in this Court should not be prolonged, and that the petition for writ of certiorari should be promptly denied.

Respectfully submitted,

L. Edward Hart
John Paul Stevens
Edward I. Rothschild
Attorneys for Respondent,
Bowfund Corporation, formerly
Bowman Dairy Company

Of Counsel

Rothschild, Hart, Stevens & Barry
105 South La Salle Street
Chicago, Illinois 60603

[28] In *United States* v. *DuPont & Co.*, 366 U.S. 316, this Court also noted that the "policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture." 366 U.S. 316, at p. 334. Such continued regulation of private affairs is necessarily involved in the relief which the Commission would seek upon remand.

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JOHN F. DAVIS, C

No. 970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, *Petitioner*

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT DEAN FOODS COMPANY IN OPPOSITION

HAMMOND E. CHAFFETZ
WILLIAM R. JENTES
DONALD G. KEMPF, JR.

Attorneys for Respondent
DEAN FOODS COMPANY

Of Counsel:

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
Room 2900, Prudential Plaza
Chicago 1, Illinois

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---

BRIEF FOR RESPONDENT DEAN FOODS COMPANY IN OPPOSITION

QUESTIONS PRESENTED

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit, which denied the Federal Trade Commission's request for preliminary injunctive relief against the sale of the operating assets of the Bowman Dairy Company to Dean Foods Company, asserts that only one question is presented—that of the standing of the Commission to seek a preliminary injunction from the Courts of Appeals under the "all writs" statute, 28 U.S.C. §1651(a) (Pet., p. 2). However, the Commission, itself, recognized below that a preliminary injunction cannot issue, even assuming jurisdiction, unless there is a "likelihood of ultimate Government success on the merits" (Comm. Mem., p. 16). Accordingly, the

threshold question raised by the petition is whether this is an appropriate case to test the Commission's extraordinary request for a preliminary injunction, considering that (a) Bowman's operating reverses were so severe prior to the sale that its owners would have liquidated its dairy business in any event; (b) the sale has been consummated and a reconstitution of Bowman is no longer practical; (c) the sale will have significant competitive benefits for smaller dairies, milk producers and customers; and (d) irreparable injury will be caused Dean if it is compelled to preserve the acquired assets in status quo pending a full hearing on the merits.

Because the record so conclusively demonstrates that the Commission will be unable to sustain its case on the merits and that its motion for a preliminary injunction must be denied in any event, there is in fact no real occasion to reach the question of whether the Commission may secure a preliminary injunction from the Courts of Appeals when Congress, three Circuits, all the commentators and the Commission, itself, have recognized that it has no standing to seek such relief, and the only case cited to the contrary is admitted by the Commission to be "distinguishable".[1]

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[1] Dean has attempted from the outset to reach the merits of the controversy but has been rebuffed by the Commission, whose major concern has been to use this proceeding as a "test case" for its jurisdictional theories. Thus, when respondents argued these points to the Court of Appeals, the Commission accused them of "invit[ing] the Court to put aside the jurisdictional question and instead deny on the merits." (Transcript, p. 116.)

STATEMENT

Following five years of declining sales, mounting operating losses and frustrated efforts at internal rehabilitation, Bowman, on December 13, 1965, entered into an agreement to sell its operating assets to Dean (Kullman Aff., pp. 1-3).[2] In the Chicago metropolitan market, where the bulk of Bowman's business was located (and the Commission has elected to rest its case), Bowman's sales had declined from $56.8 million in 1960 to $46.6 million in 1964, or about 18% (*id.*, p. 3). Its losses had risen during the same period from $197,000 to $1,572,000 (*ibid.*)

Every indicator pointed to a further deterioration in Bowman's financial and operating plight. The company had long been committed to home milk delivery, where the consumer shift to store purchasing had resulted in disastrous sales losses (*id.*, pp. 2, 3). Bowman's inability, despite strenuous management efforts, to build adequate store volume to offset these home delivery losses had, in turn, led to steadily rising costs (*id.*, pp. 3-6). And, in an industry where modern production facilities are essential to continued competitive vitality, Bowman's plants and equipment had become increasingly obsolescent. Significant capital improvements had been made only in the Chicago plant, where, despite the completion of a million dollar modernization program in 1964, continued losses were anticipated (*id.*, pp. 7, 8).

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[2] Six weeks prior to the formal execution of the purchase agreement, respondents, *on their own initiative*, brought to the attention of the Commission's staff all of the essential facts relating to the transaction which were later set forth in their affidavits filed with the Court of Appeals and to which reference is made in this Statement. (See p. 5, *infra*.) After a thorough investigation, the Commission was unable to controvert these facts in any material respect.

Faced with the prospect of increasing operating losses and the absence of an internal solution to its problems, Bowman's management and shareholders concluded that an effort had to be made to find a buyer for the company's dairy business and, in the event none was available, to effect a piecemeal liquidation as rapidly as possible (*id.*, pp. 11, 12).[3] Approaches were made to the only prospective purchasers which Bowman believed could reasonably be expected to make an offer (*id.*, pp. 12, 13). Only Dean expressed any interest and it was willing to pay less than two-thirds of Bowman's net worth (*id.*, p. 13).

Although Dean had shown a modest growth in recent years, both its sales and profits had declined in 1964 and, as a medium-sized regional dairy, it was dwarfed by the giant national firms. (Compare Dean Aff., pp. 1-3 with *Beatrice Foods Co.*, Trade Reg. Rep., 1963-1965 Transfer Binder, ¶17,244 at p. 22,325 (FTC 1965)). While Dean accounted for approximately 7% of the Chicago market, over three-quarters of its business was with a single customer, Jewel Tea Company, which had recently disclosed its plans to open its own dairy plant (following the lead of other corporate and cooperative food chains) and to terminate its supply arrangements with Dean (Dean Aff., pp.

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[3] Bowman's stock was closely held, with nearly a third in the hands of two elderly widows, one of whom had recently died. The Senior Trust Officer for the Northern Trust Company of Chicago, which acts as Co-Executor, stated that it had "carefully and independently evaluated [the] future income requirements" of the estate and had "concluded that the continued operation of Bowman's dairy business on its present basis was unwarranted and that these operations should preferably be sold as a package or, if necessary, liquidated on a piecemeal basis and the funds generated from such a sale or liquidation re-invested elsewhere." (Turner Aff., pp. 1, 2. See also Clark Aff., p. 2 and Bowman Aff., p. 1).

1-3).[4] To counter this severe threat to its operating efficiency and competitive vitality, Dean decided to commit a sum equal to nearly its entire net worth to the purchase of Bowman's assets. Dean hoped that by disposing of Bowman's home delivery routes to smaller dairies equipped to service them at a profit and by effecting cost-cutting consolidations of Dean and Bowman operations, it could operate the remaining Bowman business at a profit and thereby offset the loss of the Jewel account (*id.*, p. 4).

All these matters were brought to the attention of the Commission's staff well in advance of the execution of the purchase agreement in mid-December so that the Commission could have an opportunity to investigate fully the proposed sale (Jentes Aff., pp. 1-3). Additionally, the staff was invited to suggest any modifications in the transaction, short of its complete abandonment, which would make it acceptable to the Commission (*id.*, p. 5). However, the Commission declined to pursue discussion of any alternatives and, on December 22, 1965, filed its administrative complaint charging that the proposed sale violated Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. This was followed, on December 30, 1965, by the Commission's petition to the Seventh Circuit praying for (a) a preliminary injunction against the closing of the transaction pending completion of the administrative proceeding and (b) a temporary restraining order until five days after the Court of Appeals issued its ruling. On January 4, 1966, the Court of Appeals entered the temporary restraining order requested by the Commission.

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[4] In this connection, attention is invited to the confidential letter recently forwarded to the Commission which has been filed with the Clerk of this Court.

In opposition to the Commission's petition, the respondents filed affidavits detailing the facts set forth above concerning Bowman's operating reverses and decision to liquidate and Dean's reasons for making the purchase. They also showed that after the loss of the Jewel account and the sale of Bowman's home delivery routes to other dairies in the Chicago area, the acquisition would give Dean a market share which was less than half the 23% share of the market accounted for by Dean and Bowman before the sale and well below the 16% formerly enjoyed by Bowman alone (Dean Aff., p. 5). In addition, respondents filed the affidavits of the Executive Secretary of the Associated Milk Dealers of Chicago, which represents substantially all dairies in the market, the General Manager of the Pure Milk Association, a cooperative composed of dairy farmers supplying the major part of the milk to the area, and the Chairman of Grocerland Co-Operative, a large independent retail grocers' cooperative. These established that (a) "prices to farmers will not be affected by Bowman's sale of its dairy operations to Dean because prices to farmers are determined through a Federal order and a superpool" (McWilliams Aff., p. 1); (b) there is "no likelihood that Dean's acquisition of Bowman's dairy operations will give it the market power to charge other than competitive prices . . . [since] there are many alternative milk suppliers" to whom customers "could turn should this unlikely event occur" (Karlos Aff., p. 1); (c) there are presently "a large number of aggressive and vigorous dairies in the Chicago market and . . . competition has been increasing rather than decreasing" (Nonnamaker Aff., p. 2); (d) in view of the trend by some large supermarket firms toward ownership of their own dairies, "if independent grocers . . . are to remain competitive with such vertically integrated chains, they must be able to purchase their milk from efficient independent dairy companies" and Dean's purchase

will enable it "to remain competitive in the dairy industry and to supply independent grocers with milk at the lowest possible prices" (Karlos Aff., p. 2); (e) in short, the acquisition can have "no conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally" (Nonnamaker Aff., p. 2; McWilliams Aff., p. 2; Karlos Aff., p. 1). In fact, Dean's plan to sell off the Bowman home delivery routes to smaller dairies "will significantly strengthen the competitive vitality of these firms by giving them an opportunity to reduce their distribution and processing costs and increase their operating efficiency" (Nonnamaker Aff., p. 2).[5]

On January 19, 1966, the Court of Appeals, after oral argument and extensive briefs on both the merits and the jurisdictional issue, denied the Commission's petition on the ground that "the Commission did not have authority to institute this proceeding in this court" (App. A to Pet., p. 21). Further, with knowledge that the parties were committed to consummate the transaction once the court proceedings were dismissed, the Court vacated its previous order which had stayed the closing until five days after entry of its judgment. The transaction was, accordingly, closed on January 19, at the time specified in the agreement as extended. Pursuant to the agreement, Dean took title to Bowman's plant, equipment, inventory and accounts receivable. Bowman, however, retained all cash and marketable securities, which had constituted the company's working capital.

On January 24, 1966, Mr. Justice Clark stayed any further material changes in Bowman's operations or assets pending a decision on the instant petition, with the excep-

[5] Despite its canvass of the Chicago market, the Commission was unable to secure a single affidavit to the contrary from any dairy competitor, milk supplier or customer.

tion that Dean was authorized to dispose of Bowman's home delivery routes. The sale of those routes is presently being effected.

REASONS FOR DENYING THE WRIT

The Federal Trade Commission, in its zeal to treat this case as a vehicle for testing its theory, now rejected by three Circuits, that the Courts of Appeals should be transformed into a forum for hearing the Commission's preliminary injunction requests, has utterly ignored the realities of the transaction at issue. Its entire case, predicated on a quixotic hope of keeping Bowman intact as a viable competitor, is undercut by the simple facts that (a) Bowman's operating reverses had reached such proportions prior to the sale that its owners had decided to withdraw from the dairy business regardless of whether they were able to sell to Dean, and (b) now that the transaction has been closed and this Court has authorized the disposition of half of Bowman's Chicago operations, there is no realistic basis on which Bowman could be reconstituted. Indeed, assuming a reconstitution were conceivable, the result would be less, not more effective competition. In short, while there is no colorable basis for the Commission's jurisdictional claims, the absence of any reasonable probability that a preliminary injunction would issue makes this an inappropriate case to test out its theories in any event.

1. **This is not an appropriate case to test the Commission's jurisdictional theory, since it is not entitled to a preliminary injunction under any circumstances.**

   a. **There is no way Bowman can be kept alive as an effective competitor in the dairy industry.**

The Commission's petition for a writ makes repeated reference to "re-establish[ing] Bowman as a viable firm and effective competitor in the Chicago packaged milk

market" (pp. 10, 4, 8). In is an unreasoned hope that has led the Commission to proceed from the outset of this case on the mistaken premise that Bowman could be kept in the dairy business if the sale to Dean could be thwarted. Quite apart from the fact that a company which is losing over a million dollars a year in the Chicago market is hardly "a viable competitor," the Commission has ignored the uncontroverted statements of responsible Bowman officials and shareholders that they had concluded that the company's dairy operations would have to be terminated even if the sale to Dean did not go through. Simply put, Bowman had reached the point where the continuation of its dairy business was merely throwing good money after bad. Thus, the result for which the Commission argues is a futile one; even if Bowman could be "re-established", its owners would proceed with a piecemeal liquidation on their own.[6]

If it was futile to think of maintaining Bowman as an effective competitor before the sale of its operating assets to Dean, it is even more unrealistic to think that the particular assets involved here could be kept in limbo pending lengthy hearings before the Commission and the courts on the merits and then converted into a "going concern" at some future date (Pet., p. 10). This Court has already given some recognition to this fact by authorizing the sale of the former Bowman home delivery routes, and that business (which accounted for 50% of Bowman's Chicago sales) will shortly be irretrievably disposed of. Other press-

[6] The Commission's intimation (Pet., p. 9, n. 7) that Bowman's shareholders and management were apparently deceived about the straitened financial condition of their own company is patently absurd. The company's sharp sales decline, its mounting operating losses and its bleak prospects speak for themselves.

ing problems remain. As long as the future of the former Bowman operations remains uncertain, key employees and customers are subject to loss at any time. In addition, steps must be taken to scrap outmoded Bowman plant and equipment, and other Bowman operations must be integrated with those of Dean if necessary cost-cutting is to be effected and Dean is to salvage its heavy commitment to the Bowman transaction.

It would, in short, be unjust as well as unrealistic to force upon Dean the vain task of trying to keep assets, which had collectively been generating substantial losses prior to the sale, intact over an extended period of time pending an eventual ruling on the merits. The Court of Appeals, after a full hearing and with knowledge of the irreparable injury which would result from further delays, deliberately lifted its prior order staying the closing until *five days after* its ruling. Under the terms of the agreement, the vacation of the stay left Dean no alternative but to proceed with the closing or be in default under the contract. It would be harsh to saddle Dean, which had been authorized to proceed by the Court, and required to do so by the contract, with the losses inherent in a further stay, on the very dubious assumption that the Commission will prevail on the merits and in the utopian belief that Bowman could be reconstituted as a going concern in the dairy business.

b. Even if Bowman could be reconstituted, the result would be less, not more, effective competition.

The Commission's futile gesture at a reconstitution of Bowman is particularly misplaced since the sale of Bowman's dairy operations to Dean can only lead to significant competitive benefits. The fantasy which the Commission has conjured up of an amalgam of two industry giants

threatening the foundations of competition in the dairy industry bears no likeness to the real competitive effects of this transaction. As is conclusively shown by the undeniable facts of record, concentration will decrease, not increase; smaller dairies, milk producers and customers will be benefited, not harmed; and competition generally will be strengthened, not weakened.

Blindly focusing on its own statistical sleight-of-hand instead of the incontestable competitive realities, the Commission has assumed that because Bowman had 16% of the Chicago market before the sale and Dean had 7%, the acquisition must result in a combined market share of 23%, with Dean "the leading seller in the market by a substantial margin" (Pet., p. 9). Two facts refute this assumption: (a) Dean is already in the process of reselling the home delivery routes which accounted for 50% of Bowman's Chicago sales volume to smaller dairies in the market, and (b) Dean stands to lose its largest customer, which presently accounts for 75% of Dean's Chicago sales. The net effect will be to leave Dean with a market share only slightly larger than it had before the acquisition, and well below that which was enjoyed by Bowman *alone*. In fact, with the loss of the Jewel account, Dean would be an insignificant factor in the Chicago market absent the acquisition.

Because of these developments, the sale will also result in a substantial *decline* in the share of total sales "accounted for by the first four sellers" in the market (Pet., p. 9). The position of all other dairies, on the other hand, will increase from 58% to as much as 70% or more of the Chicago market. Consequently, the acquisition will continue the trend toward declining concentration in the Chicago market already evident in statistics compiled by the Department of Agriculture showing that the share of the four largest

dairies had dropped from 52% in 1954 to 42.3% in 1961.[7] Additionally, the acquisition will help to counter any attrition in the number, as opposed to the market share, of smaller dairies (see Pet., p. 9), since Dean's disposition of the former Bowman home delivery routes will enable these smaller firms to effect greater distribution and production efficiency.

To the extent that the Bowman volume which Dean may hope to retain offsets the loss of the Jewel account and gives Dean the wherewithal to maintain its position as an effective regional competitor, the acquisition serves a purpose which the Commission itself has stressed—that of developing "a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms." *Beatrice Foods Co., supra,* p. 22, 337.[8] It will also permit Dean to maintain the efficiency required to supply low-cost dairy products to independent grocers, thereby enabling them to remain competitive with corporate and cooperative supermarket chains owning their own dairy facilities.

Finally, since Bowman would have gone out of business in any event, it is unrealistic to view the transaction as either eliminating a competitor or having an adverse effect on competition. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 319 (1962); *International Shoe Co.* v. *Federal Trade Com-*

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[7] Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS 30 (rev. ed. April, 1964). Statistics for the period since 1961 are not available.

[8] Dean is just such a firm. The Commission's frequent references to Dean as the "12th largest dairy" overlook the substantial "disparity in size between the eight or nine largest [dairies] and even the larger independents" noted in the *Beatrice* opinion (*id.* at p. 22,326).

mission, 280 U.S. 291 (1930); *Beegle* v. *Thomson*, 138 F.2d 875 (7th Cir. 1943); *Northwest Airlines, Inc.* v. *C.A.B.*, 303 F.2d 395 (D.C. Cir. 1962); *United States* v. *Gimbel Bros.*, 202 F. Supp. 779 (E.D. Wis. 1962); *United States* v. *Ling-Temco Electronics, Inc.*, 1961 Trade Case 78,621 (N.D. Tex.). Contrary to the Commission's argument (Pet., p. 9, n. 7), none of these cases requires that the acquired company be in actual bankruptcy, providing its competitive vitality has been significantly impaired and there are no indications of any other anticompetitive effects.[9]

In light of these facts, it is little wonder that all of the industry witnesses (representing milk suppliers, customers and competing dairies) agreed that the Bowman sale could have no adverse effects on competition and would, on the contrary, have significant competitive benefits. The very real doubt which has thus been cast on the Commission's ability to sustain its Section 7 and Section 5 contentions provides still a further reason why this is a particularly inappropriate test case for the Commission's novel jurisdictional theories.

2. The Commission's theory that the Courts of Appeals should be turned into a forum for hearing preliminary injunction motions is impractical and legally unsupportable.

Even the Commission's rhetoric cannot obscure what Congress, the commentators and the Commission, itself, have consistently recognized—that the Commission has no power to seek preliminary injunctive relief against alleged violations of the antitrust laws, either from the Courts of Ap-

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[9] As for the Commission's implication that another bona fide purchaser was available (Pet., p. 9, n. 7), this contention was thoroughly discredited before the Court of Appeals (Resp. Br., pp. 16, 17; Schaub, p. 1; and Roney, p. 1).

peals or elsewhere. Since three circuits have now confirmed that conclusion and the lone authority relied on by the Commission is admittedly distinguishable, there is neither an important question nor a conflict among circuits which requires review by this Court.

The Commission's argument (Pet., p. 15) that "it would be anomalous for the availability of relief *pendente lite* to depend on whether suit under the Act was brought by the Department of Justice or the Federal Trade Commission," loses sight of the fact that when Congress enacted the antitrust laws, it made "careful and deliberate provision" for a scheme of dual enforcement. It assigned to the Department of Justice the task of criminal prosecution under Sections 1 through 3 of the Sherman Act, 15 U.S.C. §§1-3, the right to recover damages on behalf of the United States under Section 4A of the Clayton Act, 15 U.S.C. §15(a), and the power to obtain equitable relief, including injunctions against threatened violations of the antitrust laws, under Section 4 of the Sherman Act, 15 U.S.C. §4, and Section 15 of the Clayton Act, 15 U.S.C. §25. The Commission on the other hand, was authorized to proceed administratively under Section 11 of the Clayton Act, 15 U.S.C. §21, with power to hold its own hearings and to issue cease and desist orders. Congress made no provision for the issuance of preliminary injunctions by the Commission, itself, or for its application to any court for such injunctive relief.[10] Indeed, the Commission was not even authorized to issue a complaint against a threatened violation of the antitrust laws—as it has attempted in this case—since its authority under Section 11(b) was

[10] Compare Section 5(9) of the Interstate Commerce Act, 49 U.S.C. §5(9), authorizing the ICC to seek injunctive relief from the district courts against alleged violations of the Interstate Commerce Act.

limited to instances where the respondent "is violating or has violated" the Clayton Act.[11]

Congress was equally precise concerning the jurisdiction of the Courts of Appeals with respect to proceedings brought by the Commission. It provided in Section 11(c) of the Clayton Act that the jurisdiction of the Courts of Appeals should attach only *after* the Commission had issued a cease and desist order and a petition had been filed for its review.

In view of the elaborate care with which Congress spelled out the enforcement scheme which it intended for the antitrust laws and the specific delineation it gave to the role of the Commission and the Courts of Appeals in that scheme, it is absurd to argue, as the Commission does here (Pet., p. 11), that Congress nonetheless intended to give the Commission, through the generalized provisions of the "all writs" statute, 28 U.S.C. §1651(a), the very power it so consciously withheld when it dealt specifically with the Commission's power in the antitrust statutes. This conclusion is confirmed by the amendatory action which Congress has taken with respect to that legislation on at least three separate occasions:

First, in 1938, Congress amended the Federal Trade Commission Act to provide in Section 13, 15 U.S.C. §53, for an express grant of authority to the Commission to apply

[11] "The FTC cannot even issue its complaint until a merger or acquisition has been consummated; it has no power to block a merger entirely." Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. 391, 404 (1965); *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on H.R. 9424,* 84th Cong., 2nd Sess. 465 (1956); *cf. United States* v. *Union Oil Co.,* 343 F.2d 29, 31 (9th Cir. 1965).

to the district courts for temporary injunctive relief against the dissemination of false advertisements. Not only does this show that where Congress wished to grant the Commission the right to secure a preliminary injunction it specifically so provided, but it also reveals that Congress did not believe that, absent an express legislative grant, the "all writs" statute conferred such authority on the Commission.

Second, in 1959, Congress amended Section 11 of the Clayton Act to provide for the issuance by a Court of Appeals of such writs as are "necessary in its judgment to prevent injury to the public or to competitors *pendente lite.*" 73 Stat. 243. However, Congress did not disturb the jurisdictional prerequisite that the Commission should first have completed its administrative proceedings and a petition for review of its order should have been filed with the court. See 15 U.S.C. §21(c). The failure of Congress to broaden the jurisdiction of the Courts of Appeals in this respect is particularly significant since the Commission had only recently been twice rebuffed by the courts in its efforts to secure a preliminary injunction pending the completion of its administrative proceedings. *Federal Trade Commission* v. *International Paper Co.,* 241 F. 2d 372 (2nd Cir. 1956), and *Federal Trade Commission* v. *Farm Journal, Inc.* (3rd Cir. 1955, unreported).[12]

Third, in 1956 and again in 1965, Congress refused to enact legislation, submitted at the behest of the Commis-

[12] For a discussion of the *Farm Journal* decision, see *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on H.R. 9424, supra,* where the then Chairman of the Federal Trade Commission, Judge Gwynne, noted that "the Commission's petition was summarily denied by the court" (p. 465).

sion, which would have given the Commission the right to obtain a preliminary injunction against alleged violations of the antitrust laws.[13] This refusal to broaden the Commission's enforcement authority cannot be dismissed as mere "legislative inaction" (Pet., p. 13), for it was accompanied by an explicit Congressional recognition that the Commission did not have the power to obtain such preliminary relief.[14] For example, H.R. Rep. No. 1889, 84th Cong., 2nd Sess., noted the "lack of a provision to enable the Commission to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of proceedings." (p. 4). Likewise, the Staff Report of the Senate Subcommittee on Antitrust and Monopoly remarked that "the Federal Trade Commission now lacks the power to seek restraining action of a court to prevent consummation of a proposed merger or acquisition or to maintain the status quo," but it also observed that the Commission "does have the right to request the Attorney General to seek such action on its behalf." S. Rep. No. 132, 85th Cong., 1st Sess. 53.

The Commission's present position that no significance should be attached to this repeated rejection of its legis-

[13] See H.R. 9424, S. 3341 and S. 3424 submitted in the 84th Cong., and H.R. 49 and H.R. 1574 in the 89th Cong. The Commission observes (Pet., p. 13, n. 12) that these bills would have granted the Federal Trade Commission the right to seek preliminary injunctive relief from the district courts or to issue such injunctions on its own, rather than the right to apply to the Courts of Appeals for such relief. However, this only serves to underscore the Commission's own recognition that the Courts of Appeals are an inappropriate forum for the hearing of preliminary injunction proceedings (see p. 23, *infra*).

[14] Moreover, the House did pass H.R. 9424 in 1956, but it failed to gain the approval of the Senate.

lative proposals, since Congress purportedly contemplated that the Commission would have a right to preliminary injunctive relief in any event, is in striking contrast to the representations which it has made to Congress.[15] Thus, the Chairman of the Commission advised the Senate Judiciary Committee in 1956 that there was no "provision which enables the Federal Trade Commission either to take action to prevent mergers prior to consummation, or after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." Hearings Before the Subcommittee on Antitrust and Monopoly, *supra*, p. 463. In 1960, the Commission's Chairman reiterated this view. Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra*, 1961 Antitrust Law Symposium 21, 41. And as recently as the Commission's Annual Report for 1964, it again called attention to the need for legislation authorizing it to obtain pre-hearing injunctive relief. 1964 Fed. Trade Comm. Ann. Rep. 33. It is also significant that §1.112 of the Commission's own Rules of Practice makes no provision for the type of preliminary injunctive proceeding which it has attempted to institute in this case, but only for application to the Courts of Appeals after a "petition for review of an order to cease and desist has been filed."

The commentators have, without exception, agreed that the Commission had no standing to seek a preliminary injunction. For example, the present Assistant Attorney General in charge of the Antitrust Division, who has joined in the Commission's petition to this Court, has recognized that absent amendatory legislation the Commission does not have the "power (which the Department of Justice has

[15] It also appears unreasonable to assume that the Commission would have expended such effort to secure legislation which it now argues is superfluous.

now) to seek a preliminary injunction in any Federal District Court." Kaysen & Turner, ANTITRUST POLICY 258 (1959). See, also, Comment, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act*, 40 N.Y.U. L. Rev. 771 (1965); Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 402-405 (1965); Comment, 32 N.Y.U. L. Rev. 1297 (1957).

Finally, the only three Circuits which have ruled upon the jurisdictional issue presented here—the Seventh in the instant case, the Second in *International Paper* and the Third in *Farm Journal*—have concluded that the Commission has no power to seek a preliminary injunction under the "all writs" statute. As previously noted, the Third Circuit "summarily denied" the Commission's petition without an opinion. The Second Circuit, however, treated each of the contentions made to this Court and rejected them out of hand. It reasoned that "the specific provisions as to who may seek injunctive relief, and in what courts, imply that the Commission itself is not authorized to do so." 241 F. 2d at 373. In fact, "[t]his implication is required by the statutory provisions" pursuant to which the Courts of Appeals acquire jurisdiction "only after the administrative proceeding has been concluded" (*ibid.*). "[S]ince the pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority, the 'all writs' section cannot be invoked to circumvent this limitation" (*ibid.*).

The "conflict among circuits" (Pet., p. 18) which the Commission contends is posed by the decision of the Ninth Circuit in *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (1950), *cert. den.* 340 U.S. 883 (1950), is a transparently

artificial one. The Commission, itself, in the application for preliminary injunction which it filed with this Court, characterized the case as "distinguishable" (p. 6).[16] *Transamerica* involved a complaint under Section 7 of the Clayton Act prior to the 1950 amendment which made it applicable to asset acquisitions. At that time it was possible, even after administrative hearings had been commenced, for a respondent completely to oust the agency of its jurisdiction by transferring the assets of a corporation whose stock had been acquired to a different entity. See, *e.g. Arrow-Hart & H. Co.* v. *Federal Trade Commission*, 291 U.S. 587 (1934). The Ninth Circuit's holding that it had power under the "all writs" statute to enjoin such a threatened transfer was thus predicated on the fact that otherwise the jurisdiction of both the Board of Governors and the Court of Appeals would have been irretrievably lost. That the court did not view its action as comparable to a preliminary injunction is borne out by its observation that it had issued its writ "not as an injunction in equity, however much equitable principles must be applied, but solely as a writ in aid of the jurisdiction of this court." 184 F. 2d at 317.

The situation presented by *International Paper, Farm Journal* and the present case is entirely different. There is no action which the respondents can take which will result in any loss of jurisdiction either by the Commission or the Court of Appeals. The Commission will be able to proceed with its hearings regardless of whether its petition is denied and the Court of Appeals will similiarly have an opportu-

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[16] Aside from casting considerable doubt on the validity of *Transamerica*, the commentators have also uniformly recognized that it presents no real conflict with the situation presented here. Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 405 (1965); Comment, 32 N.Y.U. L. Rev. 1297, 1299, 1300 (1957).

nity to review any Commission order which may be entered on the merits.

The cases, other than *Transamerica*, on which the Commission relies (Pet., pp. 11, 12) are equally inapposite. Certainly they do not support its contrived argument that an issue of jurisdictional impairment is raised because it will allegedly be unable to issue what it views as "an effective order" (Pet., p. 17). Those cases either deal with situations where, absent injunctive relief, the court's jurisdiction would have been totally defeated, or merely recognize the inherent power of a court to preserve the status quo in a matter already pending before it. Indeed, the only cases remotely in point are *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943), in which this Court observed that "where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions . . ." and *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), where this Court, in the very footnote cited by the Commission, pointed out that even the limited power ordinarily available to preserve a court's jurisdiction "has never been recognized in derogation of . . . a clear Congressional purpose to oust judicial power . . ." 372 U.S. at 671, n. 22.[17]

Equally lacking in merit is the Commission's argument that a denial of preliminary injunctive relief will "disable the Commission from effectively proceeding in a significant

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[17] *Cf.* Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 403 (1965):

> "Preliminary procedures available to an agency to prevent a regulated company from exercising control over another such company through stock ownership depend in each case upon the particular statutory framework in which the agency operates; the Clayton Act provides for no such procedures."

number of important merger cases" (Pet., p. 6). No practical problems are in fact raised by a Commission request that the Department of Justice proceed in its stead. This is the procedure which has been followed for over five decades, and the Department is certainly no stranger either to merger cases or to the dairy industry. See, *e.g.*, *United States* v. *Borden Co.*, 347 U.S. 514 (1954), and *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963). Whatever "the informal arrangements between the agencies" (Pet., p. 15, n. 14), they can hardly override the statutory scheme adopted by Congress, and it is difficult to perceive why cooperation between the two agencies should be as difficult as the Commission implies.

On the other hand, the Commission has chosen to ignore the very real practical problems—of utmost importance in terms of their impact on the Courts of Appeals—which are raised by its proposal that these Courts should be turned into trial courts for the purpose of hearing the Commission's preliminary injunction requests. As the Second Circuit recognized in *International Paper*, the Courts of Appeals have no fact-finding authority. 241 F. 2d at 373. Indeed, they are singularly unsuited for such proceedings. It cannot be assumed that the hearings will be confined to affidavits alone; on the contrary, the recent tendency has been for the preliminary injunction proceeding to partake of "all of the essentials of a trial on the merits." *United States* v. *FMC Corp.*, 218 F. Supp. 817, 823 (N.D. Cal. 1963), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963); *application for preliminary injunction denied*, 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers).[18] Thus, the

[18] Recent indications "seem to suggest a governmental attempt to set forth all available evidence at the hearing." Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 400 (1965). In *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W. D. Pa 1963), *aff'd*, 320 F.2d 509 (3d Cir. 1963), for example, the hearing took five full days and produced 800 pages of testimony.

Court of Appeals may well be compelled to hold evidentiary hearings. This would entail, among other things, the taking of oral testimony and rulings on the admissibility of evidence. Moreover, whether the case proceeds on affidavits or not, depositions, interrogatories and motions to produce may be requested, in which event the courts would be required to administer and supervise these discovery proceedings.

In sum, the Courts of Appeals would be thrust into the type of hearings and investigatory proceedings which Congress has lodged only in the district courts and the Commission itself. That such a revolutionary change would be undesirable is evident from the fact that the Commission, in its many efforts to secure legislation granting it authority to seek preliminary injunctive relief, has never asked for authority to proceed in the Courts of Appeals. Finally, if this Court chooses to unlock the door to preliminary injunctive proceedings in this case, there is no reason to suppose the Commission will not request similar relief in other merger cases (since it recognizes the instant situation is not an "isolated" one (Pet., p. 8)), or in cases involving alleged violations of other provisions of the Clayton, Robinson-Patman or Federal Trade Commission Acts. Indeed, there is no logic which would deny such relief to other administrative agencies. If such a radical change is to be made in the traditional role of the Courts of Appeals, it should clearly be made by the Congress.

CONCLUSION

For each of the foregoing reasons, we submit that the Commission's petition for a writ of certiorari should be denied and the stay previously issued by this Court should be vacated.

Respectfully submitted,

HAMMOND E. CHAFFETZ
WILLIAM R. JENTES
DONALD G. KEMPF, JR.

Attorneys for Respondent
DEAN FOODS COMPANY

Of Counsel:

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
Room 2900, Prudential Plaza
Chicago 1, Illinois

Dated: February 9, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

We believe that two points raised by the briefs in opposition require reply.

1. Respondents, particularly Dean, argue (Dean Br. in Opp. 2, 8–13; Bowfund Br. in Opp. 19–22) that certiorari should be denied on the ground that the Federal Trade Commission's position on the merits of its request to the court of appeals for a preliminary injunction is unlikely to prevail. But the court of appeals held solely that it did not have jurisdiction to grant the relief requested by the Commission. It

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did not reach or determine, or intimate any view on,[1] the merits of the Commission's request. In arguing the merits here, respondents are asking this Court to dispose of the petition for certiorari by resolving in their favor a question not passed on below. Moreover, that question is one peculiarly within the lower court's discretion—the appropriateness, under equitable principles, of an order preserving the *status quo* pending completion of an administrative proceeding.

There is no warrant for such a departure from the normal practice of this Court. The jurisdictional question in this case (the only issue properly before this Court) is of course not moot, hypothetical, or abstract merely because it is possible that, should this Court reverse the court of appeals' judgment, that court may dismiss the Commission's petition on the merits. And respondents' assertion—assuming it were relevant—that the Commission's request for preliminary relief is without any merit rests upon a wholly one-sided presentation of the facts and completely ignores the fact that the lower court, in deciding whether the circumstances merited the preliminary relief sought by the Commission, would also have to consider the evidence presented in the lower court by

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[1] The court of appeals' action in dissolving the temporary restraining order at the same time that it dismissed the Commission's request for relief does not indicate that the court thought the Commission's case for preliminary relief without merit. Since the court had found that it lacked jurisdiction of the matter, it may have believed that it also lacked power to prevent the respondents from consummating the merger—the temporary restraining order being indistinguishable in effect from the preliminary injunction that the court thought it had no power to issue.

the Commission. Assuming, as we believe, that the lower court erred in holding that it lacked power to entertain the Commission's request, surely that court should have an opportunity to consider the Commission's request on the merits.

2. Respondents assert (Dean Br. in Opp. 22; Bowfund Br. in Opp. 10) that the government's jurisdictional argument is based in part on the ground of the convenience of the two government agencies (the Trade Commission and the Department of Justice) concurrently responsible for enforcing the merger law. Much more is at stake. As we shall develop more fully in our brief on the merits (if certiorari is granted), the legislative history of the merger law shows that Congress intended the Federal Trade Commission to play an equal, and not a subordinate, enforcement role. Surely the allocation of work between the administrative agency and the executive department having concurrent enforcement jurisdiction should be determined on the basis of which body is better informed on a particular merger problem—not which one may obtain a preliminary injunction. A merger case that in view of the respective knowledge and concerns of the Department and the Commission ought to remain with the Commission should not have to be shunted to the Department of Justice for the extraneous reason that a preliminary injunction seems necessary for effective relief. Thus the question whether the Commission can obtain preliminary relief in appropriate cases is no matter of the mere con-

venience of the agencies involved, but goes to the heart of a workable and efficient dual jurisdiction in the merger area.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

FEBRUARY 1966.

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95 Cong. Rec. 11487, 11490–11491, 11494, 11499, 11504 — 25

96 Cong. Rec. 16433, 16437, 16451–16453 — 25

H.R. 9424, 84th Cong., 2d Sess — 39

H.R. 49, 89th Cong., 1st Sess — 39

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H. Rep. No. 1191, 81st Cong., 1st Sess — 25

H. Rep. No. 580, 86th Cong., 1st Sess — 37

Hearing before Sub-Committee No. 3 of the House Committee on the Judiciary, on amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess — 25

Report of the Federal Trade Commission on the Sale and Distribution of Milk, 75th Cong., 1st Sess., H. Doc. 95 (1937) — 26

S. 3341, 84th Cong., 2d Sess — 39

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Miscellaneous:

F.T.C., *Report on Corporate Mergers and Acquisitions* (1955) — 26

The Merger Movement—A Summary Report (1948) — 25, 26

2 Story, *Equity Jurisprudence* (14th ed.), §§ 1232–1235, 1238 — 22

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The court of appeals filed no opinion, other than that contained in its judgment (R. 153–155), which is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1966 (R. 153–155). The petition for a writ of certiorari was filed on January 31, 1966, and granted on February 18, 1966 (R. 161). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

The Federal Trade Commission is authorized and directed to enforce Section 7 of the amended Clayton

209-783—66——2

Act—the merger law—by issuing complaints a
er appropriate hearings, divestiture orders. A
son or firm against whom such an order is
may seek judicial review thereof in the court
peals.

The question presented is whether the court
peals has power under the "all writs" statu
U.S.C. 1651(a)) to issue a preliminary inj
maintaining the *status quo* pending comple
the Section 7 proceeding, where such an injun
necessary to preserve the possibility of an e
remedy against the merger if it should be
illegal.

STATUTES INVOLVED

The relevant statutory provisions are 28
1651(a) and Sections 7, 11, and 15 of the Clayt
as amended, 15 U.S.C. 18, 21, and 25. They are
in Appendix C, *infra*, pp. 48–51.

STATEMENT

Until recently, Dean Foods Company ("
and Bowman Dairy Company ("Bowman") w
stantial competitors in the sale of packaged
the Chicago area. On December 13, 1965, De
Bowman entered into an agreement which p
that Bowman would sell to Dean all Bowman
and equipment, the Bowman name, "[t]he bene
relationships with suppliers and customers,"
tomer and supplier lists, and various other t
and intangible assets. (R. 16.) Thus und
terms of the agreement Bowman would cease
going dairy business.

1. PROCEEDINGS IN THE COMMISSION

On November 2, 1965, counsel for Dean, speaking as well for Bowman, met with representatives of the Commission's Division of Mergers to discuss the proposed acquisition. Dean stated, however, that it did not wish to obtain a formal advisory opinion as to the acquisition's legality under Section 7 of the Clayton Act (15 U.S.C. 18), as it could have under the Commission's Rules (16 C.F.R. 1.51–1.54). (R. 150–151.)

The Commission's staff made an immediate investigation of the proposed acquisition. The investigation disclosed that the proposed acquisition would eliminate all competition between the largest and the third largest firms in the Chicago milk market, already highly concentrated. Dean claimed that Bowman was losing money in its dairy business, but the Commission's investigation showed that Bowman was, in fact, making an overall profit despite some losses from its dairy operations. The Commission's investigation also disclosed that at least one other dairy had an interest in acquiring Bowman and continuing its dairy operations in the Chicago market and that there was no evidence Bowman had made any effort to obtain other purchasers. (See R. 45–46.)

On December 3, 1965, the Chief of the Commission's Division of Mergers advised Dean's counsel that the Commission's staff believed the acquisition would raise serious questions under the antitrust laws, and that, on the basis of the information then available, the staff would recommend to the Commission that it issue a complaint against the acquisition. At a further

conference between Dean's counsel and the
sion's staff on December 7, 1965, Dean sug
possible modification of the transaction—pr
divestiture of Bowman's retail home deliv
routes in Chicago. Since this would have l
in possession of Bowman's most lucrative a
business, particularly in the Chicago area,
mission's staff was unwilling to accept the

Subsequently, on December 14, 1965, Dean'
advised the Commission's staff that a purcha
ment had been executed. (R. 152.)

On December 22, 1965, the Federal Trade
sion, pursuant to Section 11(b) of the Clayto
amended, 15 U.S.C. 21(b), issued a formal c
charging that the purchase agreement viola
tion 7 of the Clayton Act, as amended, 15 U
and Section 5 of the Federal Trade Commissi
U.S.C. 45. The complaint alleged that Dean
proximately the twelfth largest dairy compa
United States with total sales in 1964 of $7
and third or fourth largest in the Chicago a
approximately 7 percent of all packaged mi
that Dean was a profitable and growing comp
net income after taxes in the past five years
9.5 percent to 13.5 percent of net stockholde
ment (R. 8, 12); and that Bowman was appro
the eleventh largest dairy company in the
States with total sales in 1964 of $77 million
largest or second largest seller of packaged m
Chicago area with 16 percent of all sales in
(R. 9.) The complaint further alleged tha

tration at the national level in the sale of packaged milk had reached formidable levels; that in the Chicago area the four largest dairy companies accounted for 43 percent of the sales of packaged milk, while the remaining dairies were vastly inferior in size; and that the probable effect of Dean's acquisition of Bowman would be to lessen competition substantially, in violation of Section 7 and Section 5 (R. 10–13).

2. PROCEEDINGS IN THE COURT OF APPEALS

The purchase agreement originally provided that the transfer of assets would take place on January 3, 1966 (R. 19). On December 30, 1965, the Commission filed a petition in the Court of Appeals for the Seventh Circuit seeking an order under 28 U.S.C. 1651(a) enjoining Dean and Bowman from taking any steps to carry out the agreement pending completion of the Commission's adjudication of its complaint. The petition stated that, "[i]n the circumstances, it is probable that the Federal Trade Commission will enter an order finding a violation" and that "the imminent consummation of this acquisition will prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." (R. 4, 3.)

Attached to the Commission's petition (and to its reply memorandum) were affidavits reciting the factual support for the allegations of its administrative complaint, and alleging further that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57 (R. 89),

and that, within the last four months alone, a
four more such firms had gone out of the ma
two as the result of acquisitions (R. 38–39). Fu
more, Dean had indicated that shortly after
quired Bowman it would dispose of the latter's
home delivery milk routes, consolidate the oper
of the two companies, and close various Bo
plants (R. 41). The likelihood of restorati
Bowman as an independent competitor was
lessened by Bowman's intention to retain 25 p
of the assets for distribution to its stockholders (
Thus, it was alleged, if Dean carried out its pla
the disposition of Bowman's assets, restoration o
man as a viable independent company would
tually impossible, even though the acquisition
sequently adjudged unlawful (R. 5).

In its response to the Commission's petition
did not dispute these allegations, contending,
that Bowman's officials had decided: (1) tha
wished to leave the market, (2) that unless they
find a purchaser for Bowman's operating asse
should proceed to liquidate the business beca
operating losses in recent years, and (3) that
half of Bowman's dairy operation in the C
area—the operation of retail home delivery ro
was no longer profitable in view of supermarke
petition. Dean also alleged that it feared it
presently lose its principal supermarket accou
that it needed Bowman's supermarket accou
offset this. (R. 59–61, 65, 70.)

On January 4, 1966, the court of appeals entered a temporary restraining order enjoining the companies from consummating the acquisition until five days after the denial of any injunctive relief (R. 53–54). On January 19, 1966, without deciding the merits of the Commission's petition, the court held that it had no power to grant the requested relief. Its judgment (R. 154) stated that

> * * * in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission.
>
> Inasmuch as no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and inasmuch as we now hold that the Commission did not have authority to institute this proceeding in this court, IT IS HEREBY ORDERED that the temporary restraining order issued herein is dissolved and the petition filed herein and this proceeding are dismissed.

3. THE CONSUMMATION OF THE MERGER

The original purchase agreement specifically provided that Dean was free "to cancel this Purchase Agreement without penalty if on or before * * * [the closing date] a complaint seeking an injunction,

preliminary injunction or temporary restraining order has been filed (and * * * has not been dismissed prior to the Closing Date) by any governmental agency, commission, or department * * *'' (R. 27). After the Commission's proceeding in the court of appeals was instituted, Dean and Bowman amended their agreement and extended the closing date until January 10, and, during the following days, the parties extended the closing nine more times (see exhibits 1, 3–10 (unprinted) to the Adamson affidavit (R. 156)). When the court of appeals dissolved its temporary restraining order at 11 a.m. on January 19, Dean and Bowman did not execute a further extension of the closing date. Instead, they closed the contract at 2 p.m., and Bowman transferred legal title to the assets involved to Dean. (R. 156–157.)

All operating assets formerly owned by Bowman are now owned by Dean, and all operations since the closing date have been conducted under Dean's supervision and direction. Bowman has ceased to be a dairy business. Its corporate name has been changed to Bowfund Corporation, and it has become an investment fund. The assets of this fund consist of the cash and marketable securities which were excepted from the purchase agreement and the proceeds of the sale to Dean—approximately $12.5 million in all.

4. PROCEEDINGS AFTER THE COURT OF APPEALS' DECISION

On January 20, 1966, the Solicitor General, on behalf of the Commission, applied to Mr. Justice Clark, as Circuit Justice, for an order enjoining further changes in the acquired assets. After consultation with the Court, Mr. Justice Clark filed an opinion

tating that he had determined to issue an order stay-
ng further action consummating the merger, pending
he disposition of a petition for certiorari (App. A,
nfra, p. 45). On January 24, 1966, Mr. Justice Clark
ntered a preliminary injunction against the respond-
nts' making any material changes with respect to the
tructure of Bowfund or the assets purchased by Dean
rom Bowman. The order provided, further, that
Dean might sell Bowman's Chicago area retail home
elivery routes upon terms and conditions acceptable
o the Commission; in making such sales, Dean was
irected to supply milk to the purchasers of the routes,
f at all, under the Bowman rather than the Dean label,
nd from former Bowman plants (App. B, *infra*, pp.
6-47). On February 18, 1966, this Court granted
ertiorari (R. 161.)

SUMMARY OF ARGUMENT

The Federal Trade Commission issued a complaint
harging that the acquisition of the operating assets
f Bowman Dairy Company by Dean Foods Com-
any would violate Section 7 of the Clayton Act, as
mended. The acquisition was to be consummated
hortly, and Dean planned to dismember Bowman's
airy business. Fearing that these steps, if carried
ut, would make it impossible to restore Bowman as
n effective competitor in the event that the acquisi-
ion was found unlawful and divestiture ordered, the
Commission applied to the Court of Appeals for the
eventh Circuit—where respondents could seek judi-
ial review of any remedial order eventually entered
y the Commission—for a preliminary injunction

against the merger to preserve the possibility of a
fective remedy. The Commission invoked the
writs" powers of the court of appeals. 28 U.
1651(a). In a brief opinion, the court dismissed
application for want of jurisdiction. We think
was error.

I

Section 1651(a) of the Judicial Code provides
the federal courts may issue writs ancillary to t
jurisdiction. The issuance of a preliminary inj
tion by a court of appeals having potential juris
tion of an administrative proceeding—the positio
the Seventh Circuit here—is a traditional applica
of this power. The only arguably novel element
is that the agency itself, rather than a private
gant, was the moving party. But, as a matter
of precedent and of policy, this makes no differe
The public has an interest, appropriately vindic
by the agency, as great as any private litigant'
preserving orderly judicial procedures of relief an
preventing their circumvention by action of the
ties to the administrative proceeding designed
defeat the effective jurisdiction of the agency and
reviewing court.

II

We do not rest with showing that the judicial p
er invoked by the Trade Commission in this case
within the traditional scope of the "all writs" stat
since respondents contend that Congress, in establ
ing a comprehensive system of enforcement in

Clayton Act, intended to displace traditional principles governing the relationship of court and agency. We go on to show that the policy of the Act supports this customary exercise of judicial power.

The legislative history of the merger law demonstrates that Congress intended the Commission to play an effective enforcement role, fully co-equal with the Department of Justice. This implies that the Commission should be able to assume primary responsibility for merger enforcement in those industries where, by virtue of greater experience and knowledge, it is better equipped than the Department to administer the law effectively. This is the essence of the constructive system of dual enforcement that Congress envisioned.

The system is gravely undermined if, as the court below held, only the Department may obtain preliminary relief in a merger case. There are some cases—the present is one—where such relief is essential if there is to be any hope of effectively remedying the injury to competition caused by the illegal merger. If, as here, such a case arises in an industry where the Commission should be primarily responsible, shunting the matter to the Department for purposes of obtaining a preliminary injunction would disrupt the proper functioning of the dual enforcement system. In these circumstances, invocation of the reviewing court's "all writs" power to preserve its appellate jurisdiction of Commission proceedings is a pre-eminently rational solution to a dilemma that Congress never intended to create.

III

This is thus a strong case for the application
traditional principles of judicial power codi
Section 1651(a), rather than for an exceptio
there is no serious objection to this result. Co
omission to provide expressly for the issuance
liminary injunctions by courts of appeals in
Trade Commission merger cases does not rei
intent to withdraw the courts' historic powers
the all writs statute. Nor do other provisions
Congress has made for preliminary relief in th
ton Act and other statutes enforced by the Com
evince such an intent, all having been adopted
texts different from the present one and without
to the problems of effective merger enforcement.
gress' inaction in the face of proposals by the
mission that it be granted specific powers w
spect to obtaining preliminary relief is also
out controlling significance, especially since
proposals differed markedly from the approach
by the Commission in this case of invoking
1651(a). Finally, the courts of appeals are e
appropriate forums to entertain applications f
liminary injunctions in FTC merger cases; st
plications similar in character and difficulty
staple feature of their jurisdiction. In sum, th
tion urged here is entirely proper and essen
the implementation of congressional intent f
enforcement of Section 7.

ARGUMENT

INTRODUCTION

This case presents a procedural question of major practical importance in the administration of Section 7 of the amended Clayton Act (15 U.S.C. 18)—the merger law. Since the question arises out of the dual system which Congress established for enforcement by public agencies[1] of the prohibitions of the Clayton Act, we preface our argument with a brief description of that system.

Section 15 of the Act (15 U.S.C. 25) empowers the federal district courts to entertain equity actions brought by the Department of Justice "to prevent and restrain" violations of the Act. Section 11 (15 U.S.C. 21) establishes a concurrent administrative enforcement jurisdiction. Thus, for every violation of the Act, both the Department and one of the federal administrative agencies have the power to initiate a remedial proceeding. Section 11(a) parcels out enforcement responsibility among the administrative agencies along the lines of their regulatory jurisdictions. Thus, the Federal Reserve Board is empowered to enforce the Act where applicable to banks, the Inter-State Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, etc.—and the Federal Trade Commission "where applicable to all other character of commerce." The Trade Commission thus has Clayton Act jurisdiction over

[1] There are also provisions for enforcement by private individuals or firms injured by a Clayton Act violation. Section 16, 15 U.S.C. 26 (injunctive proceedings); Section 4, 15 U.S.C 15 (treble damages). These provisions are not involved here.

the entire unregulated sector of the economy. S
the prohibitions of the Act are in many insta
inapplicable in regulated industries, in general
the Trade Commission has occasion to enforce the
administratively.

The basic procedure for administrative enforce
is prescribed in Section 11(b), which provides tha
agency, if it has reason to believe that the Act
been or is being violated, shall issue and ser
complaint and afford the respondent a hearing.
hearing is normally a trial before a hearing exam
which differs little in basic character or proce
from a district-court equity trial.[2] The age
staff prosecutes the action in accordance with
separation-of-functions provisions of the Admini
tive Procedure Act (5 U.S.C. 1004(c)), and both
counsel and respondent may appeal the exami
decision to the full agency. If the agency, on
basis of the record before it, concludes that the
has been violated, it may issue a remedial o
equitable in character. If the agency dismisses
complaint, the matter ends there. If it issu
remedial order, the respondent, by virtue of Se
11(c), has a right to seek judicial review of the o
in the federal court of appeals of any circu
which the respondent resides or does business o
violation occurred. If the court of appeals af
the Commission's order, it issues its own orde
forcing the Commission's.

[2] For the particulars of the procedure in Federal
Commission cases, see 16 C.F.R. 3.1–3.28 (Rules of Practi
Adjudicative Proceedings).

In cases brought by the Department of Justice to enforce the Act, Section 15 expressly authorizes the district court, pending final decision, to "at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." In cases originated by one of the administrative agencies, Section 11(c) provides that after the agency issues its final order and respondent has filed a petition for review of the order in the court of appeals, the court may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." But there is no reference to any form of preliminary relief between the time the complaint is issued and the time that respondent petitions for judicial review of the agency's final order.

The sole issue of this case is whether, after the Federal Trade Commission has issued a complaint charging a violation of Section 7, but before it has issued its final order, a court of appeals to which such order could be appealed may on the Commission's application issue a preliminary injunction to maintain the *status quo* pending completion of the proceeding, if such an injunction appears necessary to preserve the possibility of an effective administrative remedy. We find such power in Section 1651(a) of the Judicial Code, which authorizes the federal courts to "issue all writs [including injunctions [3]] necessary or appro-

[3] *E.g., Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399; *Stell* v. *Savannah-Chatham County Bd.*, 318 F. 2d 425 (C.A. 5); *Harrison Beverage Co.* v. *Hunsberger*, 65 F. 2d 873 (C.A. 3).

priate in aid of their respective jurisdiction
agreeable to the usages and principles of law."
judicial power invoked in this case is, as we
within the scope of Section 1651(a), and accord
the design and purpose of the merger law.

The principle that the Commission seeks to
lish in this case is an important one; as we expl
is fair to say that the fully effective enforcem
the merger law depends upon it. But it is a li
principle. Its premise is not that Section 16
grants blanket authorization to reviewing cou
grant preliminary relief on behalf of administ
agencies, but rather that the section constitutes
serve of authority which may be drawn upon in
where its invocation is necessary to the fulfillm
the agency's statutory responsibilities and is
conflict with any provision or policy laid do
Congress to govern the agency. Since our belie
the present case presents such a situation is foun
a consideration of the policy underlying Co
grant to the Federal Trade Commission of conc
jurisdiction to enforce the amended Section 7,
not suggest that similar relief under Section 165
necessarily available to other administrative ag
or with respect to other provisions of the Clayto

Nor do we contend that Section 1651(a) perm
compels a court of appeals to grant preliminary
in a merger case as a matter of course. The
must determine whether, in the particular ci
stances, the injunction is necessary or appropri
aid of its jurisdiction. In making such dete

tion, the court undoubtedly enjoys a broad discretion, to be exercised in conformity with equitable principles. That discretion was not exercised here. The court dismissed the Commission's application for preliminary relief at the threshold, holding that it had no jurisdiction to grant such an application. Hence, we do not ask this Court to rule that the Commission is in fact entitled to the relief sought. That question requires consideration of the particular facts and circumstances here—a matter for the lower court in the first instance.

I. AN INJUNCTION MAINTAINING THE *STATUS QUO* PENDING COMPLETION OF AN ADMINISTRATIVE PROCEEDING, WHERE ISSUED ON THE AGENCY'S APPLICATION BY A COURT TO WHICH THE AGENCY'S FINAL ORDER COULD BE APPEALED, AND WHERE NECESSARY TO PRESERVE THE POSSIBILITY THAT SUCH ORDER WILL FURNISH AN EFFECTIVE REMEDY, IS WITHIN THE TRADITIONAL SCOPE OF 28 U.S.C. 1651(a).

The Federal Trade Commission issued a complaint under Section 11(b) of the Clayton Act charging that the effect of the acquisition of Bowman by Dean might be substantially to lessen competition in the sale of packaged milk in the Chicago area, and hence that the acquisition was prohibited by Section 7 of the Clayton Act. Any order of divestiture or other remedial order issued by the Commission after hearings on the complaint would be appealable by respondents to the Court of Appeals for the Seventh Circuit, where they reside and do business and where the violation occurred. The Commission applied to the court for a preliminary injunction to prevent consummation of the acquisition, alleging that such consummation

would "prevent the Commission from devis
render it extremely difficult for the Commissio
vise, any effective remedy after its decision
merits." (Statement, *supra*, p. 5.) Assumin
allegations to be true (as we must, since the
appeals dismissed the Commission's applica
jurisdictional grounds without considering an
Commission's factual allegations), the initial q
is whether the application stated a claim of t
cognizable under 28 U.S.C. 1651(a), on wh
Commission predicated jurisdiction.

Section 1651(a) authorizes the federal co
issue "all writs necessary or appropriate in
their respective jurisdictions and agreeable
usages and principles of law." This grant of
has been held to authorize courts having a
jurisdiction over administrative action to "p
the *status quo* by injunction pending review
agency's action through the prescribed statuto
nels." *Arrow Transp. Co.* v. *Southern R.*
U.S. 658, 671, n. 22; see *Scripps-Howard Rad*
v. *Federal Communications Commission*, 316
Whitney Bank v. *New Orleans Bank*, 379 U
425; *Eastern Greyhound Lines* v. *Fusco*, 310 F
(C.A. 6); *Board of Governors* v. *Transameric*
184 F.2d 311 (C.A. 9), certiorari denied, 3
883; *Public Utilities Commission* v. *Capital*
Co., 214 F.2d 242 (C.A.D.C.). These decision
clear that the standard for granting such an
tion is not necessity to prevent ouster of the
ing court's jurisdiction. Such an injuncti
properly issue—as appropriate in aid of jurisd

to prevent any change in the *status quo* that would substantially impair the effectiveness of the court's ultimate judgment, even though there is no danger that the court would lose jurisdiction of the matter completely. Cf. *Continental Ill. Nat. Bank* v. *Chicago, R.I. & P. Ry,* 294 U.S. 648, 675; *Looney* v. *Eastern Texas R.R.,* 247 U.S. 214, 221. And since "jurisdiction" within the meaning of the all writs statute includes prospective jurisdiction (*McClellan* v. *Carland,* 217 U.S. 268, 280; *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21), it is equally clear that the power to issue such an injunction may be invoked while the matter is still before the agency, and judicial jurisdiction, technically, has not yet attached.

In short, a court having review jurisdiction (present or potential) over an administrative proceeding is authorized by Section 1651(a) to issue such orders as may be required to assure effective judicial review of the agency's final action. This test was met here. The Commission applied to the Court of Appeals for the Seventh Circuit—a court having potential jurisdiction of the Commission's proceeding against Dean and Bowman—for an injunction to maintain the *status quo pendente lite,* alleging that without such an injunction the jurisdiction of the Commission to issue an effective remedial order—and hence the jurisdiction of the Seventh Circuit to render an effective judgment on review of the Commission's final order—would be defeated or gravely impaired.

It makes no difference that here it is the agency itself, not a private party involved in or affected by

the administrative proceeding, that is invoking all-writs powers of the court of appeals. *Board of Governors* v. *Transamerica Corp.*, *supra*; *Public Utilities Commission* v. *Capital Transit Co.*, *supra*; cf. *National Labor Relations Board* v. *Underwood Mach.*, 198 F. 2d 93 (C.A. 1).[1] The judicial remedy provided by the review procedures of the Clayton Act is for the benefit of the Commission as well as the respondent, and this should suffice to confer standing on the Commission to invoke the all-writs power of the reviewing court where necessary to protect such remedy. A Commission order has no finality or effective

[1] In *Transamerica*, the Federal Reserve Board instituted administrative action under Section 7 challenging an acquisition of bank stock (see p. 15, *supra*). It sought an injunction from the Ninth Circuit (one of the courts of appeals which would have had jurisdiction of any final order the Board might issue) to prevent the transfer of the acquired bank assets in a manner which, under Section 7 as it then stood, would have precluded the Commission from entering an effective order with respect to the challenged acquisition. See *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 291 U.S. 587, 599; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 339, n. 17. The Ninth Circuit granted the stay and this Court denied certiorari. *Transamerica*, which has been repeatedly cited with approval by this Court in related contexts (*Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671-672; *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 421), cannot validly be distinguished from the present case on the ground that there the threatened action of the parties to the acquisition would have wholly deprived the Commission of power to enter a remedial order against the acquisition, while here some order, albeit an inadequate one, could be entered even if a preliminary injunction was denied. As we point out in the text, *supra*, Section 1651(a)'s authorization of writs necessary or appropriate in aid of jurisdiction includes orders issued to maintain the *status quo* in order to enable an *effective* judgment to be entered even if the court's jurisdiction is merely threatened.

when entered. Unless the respondent forgoes his right of judicial review, it becomes final and binding only when it is affirmed by the reviewing court. If the court affirms, moreover, it is directed by Section 11(c) of the Act to "issue its own order commanding obedience to the terms of" the Commission's order—and violation of the court's order is a contempt. If, at the outset of the Commission proceeding, a respondent takes action that would preclude the Commission from entering an effective order against the merger and thus bar judicial review of such an order, the effect is to circumvent orderly judicial procedure and deprive the public of judicial, as well as administrative, enforcement.

It would be anomalous to subordinate the public rights vindicated by the Commission to the private interests of persons affected by administrative proceedings. That would be the result, however, if the courts of appeals were deemed helpless to protect the Commission's power to issue effective remedial orders, while at the same time a competitor or customer affected by the merger could presumably invoke the court's all-writs powers. *E.g., Whitney Bank* v. *New Orleans Bank, supra.* Such a disparity would be especially ironic since Congress has manifested specific concern with effective merger enforcement by the Federal Trade Commission (see pp. 25–26, *infra*).

We derive additional support for our views of the scope of Section 1651(a) from the long-recognized principle that courts of equity have inherent power to grant temporary relief in aid of, or ancillary to, a principal action in another forum in order to preserve the *status quo* and prevent irreparable injury while the principal action is in progress. *Erhardt* v. *Boaro,*

113 U.S. 537; 2 Story, *Equity Jurisprudence* (14
ed.), §§ 1232–1235, 1238. Often the other forum,
in this case, has been an administrative agency. *E.*
United States v. *Parrott*, Fed. Cas. No. 15,998, 27 Fe
Cas. 416 (N.D. Cal.); *West India Fruit & Steamsh*
Co. v. *Seatrain Lines*, 170 F. 2d 775 (C.A. 2), ce
tiorari dismissed, 336 U.S. 908; *Isbrandtsen* v. *Unit*
States, 81 F. Supp. 544 (S.D. N.Y.), appeal d
missed, 336 U.S. 941; *Pennsylvania Motor T. Ass'n*
Port of Phila. M.T. Ass'n, 183 F. Supp. 910, 916, 9
(E.D. Pa.).[5] Thus, a federal district court has be
held to have the power "to assist the [Federal Ma
time] Commission by preserving the status quo un
it [the Commission] could determine * * * how
should act." *West India Fruit & Steamship Co.*
Seatrain Lines, *supra*, p. 779; cf. *Evans* v. *Inter*
tional Typographical Union, 76 F. Supp. 881, 8
(S.D. Ind.). This is precisely what the Trade Co
mission asked the Seventh Circuit to do here,
invoking that court's power under Section 1651(a

II. THE POLICIES WHICH UNDERLIE THE CONGRESSION
PROVISION FOR CONCURRENT ENFORCEMENT OF T
MERGER LAW BY THE DEPARTMENT OF JUSTICE AND T
FEDERAL TRADE COMMISSION SUPPORT—INDEED
QUIRE—RECOGNITION THAT THE COURTS OF APPEA
ALL-WRITS POWERS EMBRACE THE RELIEF SOUGHT
THE COMMISSION IN THIS CASE

We do not rest with a showing that the judic
power invoked by the Commission in its applicati

[5] In *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 6
this Court found a congressional intent to abrogate such inh
ent equity powers with regard to certain rate orders of
Interstate Commerce Commission. As we show in parts
and III of our argument, no comparable intent exists w
respect to merger proceedings before the Trade Commission

to the Seventh Circuit for preliminary relief is within the traditional scope of 28 U.S.C. 1651(a). For we recognize that the creation of a comprehensive system of enforcement and administration, as in the Clayton Act, may, in some circumstances, curtail traditional judicial powers. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671, n. 22. The scheme of regulation may strike a delicate balance that would be disturbed by recognizing judicial powers other than those expressly conferred therein (*Arrow Transp. Co.* v. *Southern R. Co., supra*), or may contain special provisions in light of which additional remedies would be redundant.[6] In this part of our argument we show that, far from there being any conflict between the relevant provisions of the Clayton Act and the powers conferred by Section 1651(a), the policy of these provisions requires, as an important corollary, that such powers be recognized as available in this context.[7]

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[6] The Clayton Act contains no provision that would authorize the Commission to obtain an injunction prior to entry of its final order. In contrast, some of the statutes enforced by the Commission having to do with consumer protection authorize the Commission to seek an injunction in a federal district court pending issuance of its final order. Section 13 of the Federal Trade Commission Act (Wheeler-Lea Amendments), 15 U.S.C. 53; Section 7(b) of the Wool Products Labeling Act of 1939, 15 U.S.C. 68e(b); Section 9(b) of the Fur Products Labeling Act, 15 U.S.C. 69g(b); Section 6(a) of the Flammable Fabrics Act, 15 U.S.C. 1195(a); Section 8 of the Textile Fiber Products Identification Act, 15 U.S.C. 70f. See p. 38, *infra*. We do not argue that the Commission could seek a § 1651(a) writ from the court of appeals in a case where relief in the district courts under one of these provisions was available.

[7] In the next part of the argument, we answer some specific objections to this conclusion.

A. THE HISTORY OF THE MERGER LAW EVINCES A CLEAR CONGRESS
INTENT THAT THE COMMISSION PLAY A FULLY CO-EQUAL, EN
MENT ROLE—WHICH IMPLIES THAT THE COMMISSION SHOUL
PRIMARY RESPONSIBILITY FOR MERGER ENFORCEMENT IN
INDUSTRIES WHERE IT HAS SPECIAL KNOWLEDGE AND EXPE

1. The history of Section 7 of the Clayton A
recounted at length in *Brown Shoe Co.* v. *U*
States, 370 U.S. 294, 311–315, and *United Sta*
Philadelphia National Bank, 374 U.S. 321, 33
346–348. As originally enacted in 1914, Section
not apply to mergers as such, but only to acquisiti
stock or share capital. It was aimed primarily at
ing companies and similar devices through wh
corporation would obtain (often secretly) contro
competing corporation. While, as under present
the Department of Justice had concurrent jurisd
with the Commission to enforce Section 7, fro
outset it was the Commission that bore the pri
and virtually exclusive, enforcement responsib
It was a series of Commission cases decided by
Court which showed existing law to be entirely i
quate to deal with a greater problem than holding
panies—mergers or asset acquisitions which seri
harmed the structure of competition without
to the level of Sherman Act violations. It wa

[a] The reason for this is obscure. The legislative history
1914 Act sheds little light on how Congress intended th
enforcement jurisdiction it was creating to operate. As
nally proposed, the Clayton Act contained criminal pe
but made no provision for FTC enforcement; the latt
added when the criminal penalties were dropped. The f
the debates on this substitution was on the desirability
moving the criminal sanctions. See, *e.g.*, 51 Cong. Rec.
13849, 14200–14228, 15827–15829, 16057–16058, 16280
16317–16318.

Commission which pressed most vigorously for an amendment of the law to cover mergers. And it was the Commission which documented the need for such an amendment in an influential economic report upon the merger movement (*The Merger Movement—A Summary Report* (1948)).

In light of this background, it is not surprising that when in 1950 Congress decided to amend Section 7 as suggested by the Commission, the legislators thought primarily in terms of strengthening the Commission's powers, albeit the dual enforcement provisions of the old law were retained.[9] They clearly expected that the Commission would play a very important role in the enforcement of the amended law—had not the Assistant Attorney General of the Antitrust Division himself testified that the Commission had a major contribution to make to such enforcement?[10] There can

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[9] "The predominant focus of the hearings, debates, and committee reports was upon the powers of the FTC." *United States v. Philadelphia National Bank*, *supra*, pp. 346–347. For example, the Senate Report (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 3) stated that the purpose of the bill "is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly." See, also, H. Rep. No. 1191, 81st Cong., 1st Sess., p. 12; 95 Cong. Rec. 11487, 11490–11491, 11494, 11499, 11504; 96 Cong. Rec. 16433, 16437, 16451–16453.

[10] "If it [§ 7] is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today." Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, p. 28 (remarks of Assistant Attorney General Bergson).

in short be no doubt that Congress intended th
dual jurisdiction of the Commission and the D
ment in the enforcement of the new law would
administered as to assure the Commission's eff
and not subordinate, participation.

2. For Congress' intent that the Trade Co
sion play an effective co-equal role in the admi
tion of the merger law to be realized, the Comm
must be able to assume primary responsibilit
merger enforcement in industries where it has s
knowledge and extensive experience. In dividi
sponsibilities, the Department of Justice and the
mission have respected this principle. A prin
ample is the dairy industry, in which the presen
arises. The competitive structure and behavi
this industry had been a focus of Commission
tion for many years prior to the enactment
merger law.[11] Mergers in the dairy industry
considered at length in the Commission's 1948
on the merger movement (*The Merger Move*
A Summary Report, supra, pp. 37–38). After
the Commission's concern intensified. A maj
port on mergers issued in 1955 highlighted the
industry,[12] and this was followed the next ye
a series of complaints challenging a large numb
acquisitions by the nation's leading dairy comp

[11] See, *e.g.*, *Report of the Federal Trade Commission*
Sale and Distribution of Milk, 75th Cong., 1st Sess., H
No. 95 (1937); *United Buyers Corp.*, 34 F.T.C. 87.

[12] F.T.C., *Report on Corporate Mergers and Acqu*
(1955), pp. 3, 4, 28–29, 57, 77–80, 89, 96–97, 128.

[13] *Foremost Dairies, Inc.*, 60 F.T.C. 944; *National Dairy*
ucts Corp., Trade Reg. Rep. (1961–1963 Transfer B
¶ 16,282; *The Borden Co.*, Trade Reg. Rep. (1963–1965 T

The culmination was the Commission's decision in *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244, where, on the express basis of its long experience with and extensive accumulated knowledge of many facets of the industry's competitive problems, the Commission set forth comprehensive guidelines governing the legality of certain dairy mergers. Indeed, Dean and Bowman themselves recognized the Commission's special role in dairy mergers, for it was to the Commission, not the Department of Justice, that they went to discuss the proposed acquisition.

If the Commission is to play an effective role in the scheme of dual enforcement, as Congress intended, surely it must continue to be primarily responsible for industries, like the dairy industry, where its experience and background uniquely equip it for expert and imaginative administration of Section 7. And since—as next we show—the availability to the Commission of preliminary relief in appropriate cases is essential to the Commission's merger enforcement program in such industries, it is clear that recognition of judicial power to afford such relief is fully compatible with, and indeed required by, the policies of the merger law.

B. THE COMMISSION CANNOT FULFILL ITS INTENDED ROLE IN SECTION 7 ENFORCEMENT IF DENIED THE POWER TO OBTAIN PRELIMINARY RELIEF IN APPROPRIATE CASES FROM THE COURTS OF APPEALS UNDER 28 U.S.C. 1651(a)

1. The Commission's duty to proceed against mergers that are injurious to competition would be mean-

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Binder), ¶ 16,869; *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244. *Foremost* and *Beatrice* (discussed in text) resulted in orders of divestiture after contested proceedings; the other two in consent orders of divestiture. The proceedings are described in the *Beatrice* decision.

ingless without the power to order divestiture
acquired properties. See *United States* v. *E*
Pont de Nemours & Co., 366 U.S. 316, 3
Hence, Section 11(b) of the Clayton Act (15
21(b)) expressly provides that if a violation
tion 7 is found, the agency "shall" order dive
But divestiture is not an effective remedy fo
legal merger unless it accomplishes the restora
the acquired firm as an effective and viable c
tor. See *Ekco Products Co.*, Trade Reg. Rep.
1965 Transfer Binder), ¶ 16,879, pp. 2190
(FTC), affirmed, 347 F. 2d 745 (C.A. 7). T
of an unlawful merger is that it removes as a
pendent factor a firm whose competition is im
to the competitive health of the market in
Normally, this vice cannot be cured unless
quired firm is recreated by the remedial order
cree in essentially the form in which it was ac

Between the issuance of a Commission merg
plaint and the entry of the final order of dive
there is an inevitable hiatus if the complaint
tested; for the respondent has a right to a c
trial-type hearing with the full panoply of
dural safeguards prescribed by the Adminis
Procedure Act. During this interval the resp
is free to take any action with respect to the a
properties, and sometimes the action a resp
takes prevents the entry of an effective orde
vestiture.[14] Vital plant and equipment may be

[14] The following are some examples drawn from the
sion's recent experience. *Ekco Products Co.*, Trade R
(1963–1965 Transfer Binder), ¶ 16,879, affirmed, 347 F

dismantled; essential intangible assets, such as trademarks or customer service routes, may be sold to third parties; changes in the industry or market may make

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(C.A. 7). (During Commission's proceedings the entire assets acquired from one firm were destroyed, and the operations of the other acquired firm were consolidated with those of Ekco. The Commission did not order divestiture of the assets already sold off, and its order requiring divestiture of the consolidated assets has not yet been carried out.) *Reynolds Metals Co.*, 56 F.T.C. 743, affirmed with modification of the order, 309 F. 2d 223 (C.A.D.C.). (The acquired firm's plant was abandoned and machinery was installed alongside the acquiring firm's machinery in a new plant. The court of appeals ruled that the Commission could not order divestiture of the plant acquired at Reynold's own expense. No purchaser has been found for the machinery of the acquired firm.) *Farm Journal, Inc.*, 53 F.T.C. 26. (During FTC hearings on the legality of *Farm Journal*'s acquisition of the only other national agricultural periodical, *Country Gentleman*, *Farm Journal* obtained control of the subscribers' and advertisers' lists of *Country Gentleman* and subscriptions were transferred to *Farm Journal* when *Country Gentleman* ceased to publish. No purchaser could be found for the subscriber and advertiser lists and the name, *Country Gentleman*.) *Foremost Dairies, Inc.*, 60 F.T.C. 944, order modified per stipulation, C.A. 5, No. 18,815, Feb. 24, 1965. (The operations of several dairies illegally acquired were thoroughly integrated with Foremost's operations prior to FTC's final decision so that divestiture of the assets of these firms was impossible.) *Beatrice Foods Co.*, 3 Trade Reg. Rep., ¶ 17,244. (Commission ruled that 5 acquisitions violated Section 7, but the possibility of restoring one of these competitors, Dahl-Cro-Ma, as a going concern was doubtful since part of its facilities had been destroyed.) *Brillo Mfg. Co.*, Trade Reg. Rep. (1963–1965 Transfer Binder), ¶ 16,543. (Brillo's acquisition of the Williams Company was found to be in violation of § 7, but divestiture of the Williams plant was not required. Brillo had moved some of its own operations into the Williams plant and argued that due to overcapacity in the steel-wool industry sale of the Williams plant would be difficult. Divestiture of the plant was not ordered.)

sale of the assets commercially impossible; co
tial information vital to the acquired firm's c
tive position, such as trade secrets and technica
how, may be absorbed by the acquiring firm; or
erations of the acquired company may be s
pletely mingled with those of the acquiring co
that it is impossible to disentangle them.

Such problems have plagued the Commission
of its previous dairy merger cases,[15] and are str
presented by the present case. But for the i
of a stay by this Court, there would have been
remotest possibility that the Commission coul
tually restore Bowman as an effective compe
the dairy business by an order of divestitur
merger itself was consummated just a few hou
the court of appeals dissolved its temporary r
ing order, and at that point Dean acquired
Bowman's operating assets, including its pla
equipment, customer and supplier contacts an
the Bowman name itself, and various other t
and intangible assets. Bowman (which imme
after the closing became the Bowfund Corpo
retained more than 25 percent of its former
principally cash and marketable securities, p
proceeds of the sale, which it invested. Thus,
that was a going dairy operation ranking
second in the large Chicago milk market is no
ing more than an investment fund. And th
man assets in Dean's hands will not long reta
identity unless Dean is restrained by court

[15] *Foremost* and *Beatrice*. See n. 14, *supra*.

Dean does not deny that it will, if permitted, shortly consolidate the operations of the two companies, close various Bowman plants, sell off Bowman's milk routes, and absorb its food store accounts (Statement, *supra*, p. 6). Thus the possibility of effectively divesting Dean of the Bowman assets exists only because Mr. Justice Clark's order requires Dean to preserve the Bowman operation in the Chicago milk market. On this depends the Commission's ability to remedy a merger that is very probably illegal under Section 7.[16]

[16] Bowman was the first or second ranking seller of packaged milk in the Chicago area, with a market share of 16 percent. Dean ranked third or fourth in that market, with a market share of 7 percent. There appears to be no dispute that packaged milk is the relevant line of commerce and the Chicago area the relevant section of the country in which to test the competitive effects of the acquisition. As a result of the merger, Dean became the leading seller in the market by a substantial margin, and there has been a substantial increase in the concentration of an already highly concentrated market; the 42 percent of sales formerly accounted for by the first four sellers are now, as a result of the merger, controlled by the first three—and this in a market that has shown a sharp decline in the number of independent competitors. The foregoing facts clearly demonstrate *prima facie* illegality under the decisions of this Court. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Continental Can Co.*, 378 U.S. 441. In rebuttal, Dean asserted below that Bowman is a "failing company" which its own management decided to remove from the market. But the facts alleged by Dean do not bring the case within the limited exception defined in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, and *United States* v. *Diebold, Inc.*, 369 U.S. 654. For the failing-company rule to apply, a defendant must show, first, that the acquired company is in danger of imminent failure, and, second, that the acquiring company is the only available purchaser. Neither was shown here. Bowman was not facing

2. The Commission's inability effectively charge its duties in the enforcement of without preliminary relief is not cured by that Section 15 of the Clayton Act empower partment of Justice to obtain such relief brought by the Department in federal distri Any argument that the Department could equity proceeding, not to obtain a final decr protect a pending Commission proceedin foreclosed by the language of Section 15, parently contemplates that the district court Commission or a court of appeals reviewing mission's order—shall issue the final decree case.[17] Moreover, it would be a cumbersom dundant procedure for the Department to in the district court on the same cause, a same time, as the Commission was proceedi istratively.

Hence, if Section 1651(a) is inapplicable partment must be given complete responsibili merger cases, regardless of the type of merg

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bankruptcy, but had a $10 million surplus. And De show that an alternative purchaser—acquisition would not have such serious anti-competitive effe Dean-Bowman merger—was not available. On th the existence of at least one other potential pur shown by an affidavit of that firm. (R. 45–46.)

[17] Section 15 (App. C., *infra*, p. 51) provides t the parties complained of shall have been duly notif petition [*i.e.*, the Department's pleading commencing the court shall proceed, as soon as may be, to the h determination of the case; and pending such petitio *fore final decree*, the court may at any time make s rary restraining order or prohibition as shall be deer the premises." (Emphasis added.)

industry in which it occurs, where preliminary relief appears necessary. This result would be manifestly inconsistent with the concept of dual enforcement embodied in the merger law. As envisaged by Congress, the Commission—as a fully co-ordinate agency for the enforcement of the law—was to assume responsibility in those industries where it had special knowledge and experience; and, as the present case illustrates, the need for preliminary relief is as likely to arise in one of those industries as in one where the Department rather than the Commission has primary responsibility.

This Court has long recognized the dual enforcement responsibility of the two agencies and the unwisdom of arbitrarily dividing that responsibility. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 692–693; *U.S. Alkali Export Assn.* v. *United States*, 325 U.S. 196, 208; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 310, n. 13. Discussing this problem (albeit in a different context, that of the relationship between the antitrust laws and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)), the Court in *Cement Institute, supra*, stated:

> All of the committee reports and the statements of those in charge of the Trade Commission reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not

> stopped in its incipient stages. * * * W
> conceive of no greater obstacle this Court
> create to the fulfillment of these congress
> purposes than to inject into every Trade
> mission proceeding brought under § 5 and
> every Sherman Act suit brought by the J
> Department a possible jurisdictional questi

Equally, an arbitrary jurisdictional distinction be
the two enforcement agencies, based solely
whether a pa lar merger case required pr
nary relief or not, would in fact exist if the
mission could not obtain injunctions to prevent
tration of its proceedings.

The practical effect of denying the Commi
any power to obtain preliminary relief in a m
case would be to require that responsibility for m
enforcement be allocated between the Commissio
the Department, not on the basis of which body
better equipped to handle a particular case o
basis of prior experience in the industry, but o
basis of which could obtain a preliminary injunct
a completely extraneous factor. A merger case i
dairy industry falls appropriately within the Co
sion's responsibility, in view of its long history
perience and concern with the competitive proble
this industry. Such a case should not have
shunted to the Department of Justice—the logica
sequence if respondents' position prevailed—m
because a preliminary injunction seems necessa
assure effective relief.

In sum, the policies behind the merger law
phatically support the Commission's attempt t
tain preliminary relief from the court of ap

under 28 U.S.C. 1651(a). It remains only to consider whether such exercise of judicial power is inconsistent with any other provision or policy of the law.

III. NOTHING IN THE HISTORY OR DESIGN OF THE CLAYTON ACT, OR ELSEWHERE, JUSTIFIES AN INFERENCE THAT CONGRESS INTENDED TO WITHDRAW THE COURTS OF APPEALS' ALL-WRITS POWERS IN RESPECT TO MERGER CASES BROUGHT BY THE FEDERAL TRADE COMMISSION

A. CONGRESS' FAILURE TO CONFER SUCH A POWER EXPRESSLY IS WITHOUT CONTROLLING SIGNIFICANCE

Although Congress never expressly provided that the courts of appeals shall have power to grant preliminary relief in Commission merger proceedings prior to the entry of the Commission's final order, this in itself is not dispositive. As we have seen (pp. 17–22, *supra*), the power here invoked is a part of the historic powers of the federal courts; now codified in 28 U.S.C. 1651(a), it dates back to the original Judiciary Act of 1789. 1 Stat. 81–82. In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, this Court rejected a contention similar to that advanced here—that a court of appeals could not issue a stay *pendente lite* in a Federal Communications Commission case because Congress had not expressly granted such power in the statutes defining the Commission's powers. The Court said, "denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." *Id.*, p. 11. For, the Court observed, "Unless Congress explicitly discloses such an intention we should not lightly attribute

to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest." *Id.*, p. 15. Congress has never "explicitly" disclosed any intention of withdrawing from the courts of appeals in Federal Trade Commission merger cases their historic power to protect the orderly processes of administrative enforcement and judicial review by the issuance of a preliminary injunction.

1. Respondents place special emphasis on the provision in Section 11(c) of the Clayton Act (15 U.S.C. 21(c)) that, after the Commission has issued its final order and a petition for review has been filed by the respondent in the court of appeals, that court may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." From this they argue that Congress intended the courts of appeals to have no jurisdiction to grant any ancillary relief until a petition for review has been filed. The argument is without merit.

In 1959, Congress simplified the procedures for enforcing Commission orders under the Clayton Act by amending Section 11 to make Commission orders final and effective unless respondent appealed, thereby eliminating the cumbersome enforcement procedures of the old law. 73 Stat. 243 (the "Finality Act"). The language in question referring to ancillary writs was added as part of this revision. Since the entire focus of the Finality Act was upon the

roblem of effective enforcement of Commission rders (see H. Rep. No. 580, 86th Cong., 1st Sess., p. ; S. Rep. No. 83, 86th Cong., 1st Sess., pp. 2–3), Congress, in making specific provision for ancillary relief, id not go beyond providing for the case where the Commission's order had already been entered. No nference can be drawn from this that Congress ntended thereby to limit the courts of appeals' Section 1651(a) powers *before* any order was entered. The problem of ancillary relief while the proceeding vas pending before the Commission—the problem of his case—was never alluded to in the deliberations on he Finality Act. To repeat, the purpose of the Act vas improved enforcement *after* the Commission ntered its order. Nor was there any consideration iven the special problems of merger enforcement. Moreover, the history of the ancillary-writs provision hat the Finality Act added to Section 11(c) makes lear that its adoption was intended purely as a precautionary measure.[18]

[18] The provision was taken without change or discussion from ection 3 of the Wheeler-Lea Amendments to the Federal rade Commission Act, 52 Stat. 111, 15 U.S.C. 45(c), adopted n 1938 to simplify enforcement procedures under the Trade Commission Act in the same manner later applied to Clayton ct orders by the Finality Act; and the language in Section 3 n turn originated in a letter from the Commission to the Chairman of the Senate Commerce Committee in which the Commission suggested that such a reference to ancillary writs be included in the statute to avoid any possible questions of the scope f Section 1651(a) as applied in the context of Commission proceedings under the Trade Commission Act. S. Rep. No. 221, 5th Cong., 1st Sess., p. 6.

2. Similarly, no inference of a congressiona termination on the question of this case can be d from the fact that in the Wheeler-Lea (food drug) provisions of the Federal Trade Comm Act and in other consumer-protection statute forced by the Commission, Congress made specifi vision for the Commission to obtain preliminar lief from federal district courts (see p. 23, *supra*). These statutes have nothing to do with ers. They deal with particular, narrow proble the field of deceptive food and drug advertising branding, the marketing of dangerously inflam wearing apparel, and the like. Congress deter that a district-court injunctive remedy was nec if the Commission was to deal effectively with specialized problems, without ever suggesting th Commission could not invoke the aid of a co appeals under 28 U.S.C. 1651(a) where necessa preserve the possibility of effective relief in a n case.[19]

3. Nor can any intent to foreclose that aver relief be inferred (as the Second Circuit in *F Trade Commission* v. *International Paper Co* F. 2d 372, thought) from the grant of power district courts to issue preliminary injunctions in brought by the Department of Justice under the ton Act (Section 15, 15 U.S.C. 25). This pro was formulated before there was any thought o ing the Federal Trade Commission concurrent diction to enforce the Clayton Act's prohibition stage in the passage of the Clayton Act when cr

[19] All the provisions in question were patterned after 13 of the Wheeler-Lea Amendments to the Federal

rather than administrative remedies were planned (see p. 24, n. 8, *supra*). Only later was an administrative remedy by the Federal Trade Commission and other agencies substituted for criminal sanctions. There is certainly no indication that Congress expected or desired that powers which the courts of appeals might otherwise have under the all-writs statute to grant preliminary relief in agency cases would be abrogated because it had previously decided to authorize the Department of Justice to seek such relief in cases brought by it in the district courts. On the contrary, as pointed out earlier, a system under which only the Department could obtain preliminary relief of any kind would be incompatible with the effective functioning of the dual-enforcement system established by Congress.

4. The court of appeals laid particular stress in its brief opinion upon the fact that the Commission on several occasions asked Congress for express authority to obtain preliminary relief in merger cases. See H.R. 9424 and S. 3341 and 3424, 84th Cong., 2d Sess., and H.R. 49 and 1574, 89th Cong., 1st Sess.

Commission Act, 52 Stat. 115, 15 U.S.C. 53, dealing with the advertising of food, drugs, cosmetics, and therapeutic devices. The reason for the provision appears to be twofold. There was concern that the Commission could not proceed swiftly enough under its existing authority to meet emergency situations involving life and health. 83 Cong. Rec. 398, 3293. And a similar power had been given the district courts in the enforcement of the Federal Food, Drug and Cosmetics Act (52 Stat. 1040, 1043, 21 U.S.C. 301, 332), a companion measure to Wheeler-Lea (approved a few months earlier) in that it gave the Federal Food and Drug Administration jurisdiction over labeling of the same products (foods, drugs, devices, and cosmetics) as to which Wheeler-Lea gave the Trade Commission jurisdiction over advertising.

The Commission's proposals embodied in the
however, differed radically from what is
here. None was a proposal to permit the c
appeals to grant preliminary injunctions.
volved either empowering the Commission
issue preliminary injunctive-type orders, or r
pre-merger notification by companies propo
merge coupled with provision for district-c
junction actions. At all events, these propos
never acted on by the Congress. And if in
them the Commission may have implied that it
have the power to seek preliminary relief in th
of appeals under 28 U.S.C. 1651(a), this ca
regarded as a "binding administrative interpr
of congressional intent. *United States* v. *E
Pont de Nemours & Co.*, 353 U.S. 586, 590; c
Yang Sung v. *McGrath*, 339 U.S. 33, 47.

B. THE COURT OF APPEALS IS AN APPROPRIATE FORUM FOR T
SOUGHT BY THE COMMISSION

The court of appeals is clearly a logical fo
preliminary relief in a Federal Trade Com
merger case. This is the court which has e
review jurisdiction of Commission orders
11(d), 15 U.S.C. 21(d)); which is famili
the laws administered by the Commission and
cedures applied by it; and which can enforce
sion orders directly through contempt pro
(Section 11(c), 15 U.S.C. 21(c)). Responden
ever, point to certain practical difficulties th
say a court of appeals must face in consider
plications for such preliminary relief. They
the factual disputes that may arise and the po

that trials may have to be conducted in some instances. But this is hardly a basis for assuming that Congress has stripped the courts of appeals of their "all writs" jurisdiction in such cases; and in any event the practical difficulties are exaggerated.

In the exercise of their general appellate functions, the courts of appeals every year consider and dispose of many applications for injunctions or stays pending appeal, each presenting the same general issues as here: whether the applicant can prove a substantial likelihood of success on the merits; the effect upon the chances of an adequate remedy if relief is granted or denied; whether the interests of unrepresented third parties may be adversely affected; and how the public interest may be affected by the grant or denial of relief.[20] These applications—a staple item of the courts of appeals' business—involve factual questions as difficult and as vigorously contested as any which arise from a merger proceeding. Yet the courts of appeals have managed to devise procedures for the just disposition of such applications, and to resolve the factual issues they present without evidentiary hearings. There is no reason to believe that applications in merger cases are less amenable to procedures for efficient judicial administration. As the present case illustrates, such factual issues as may arise in an applica-

[20] See, *e.g.*, *Virginia Petroleum Job. Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (C.A.D.C.); *Dunn* v. *Retail Clerks International Assn., Local 1529*, 299 F. 2d 873 (C.A. 6); *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5), certiorari denied, 371 U.S. 893.

tion for preliminary relief against a merger
dinarily be resolved on affidavits. The cou
peals, after all, is not asked to decide whe
merger is in fact illegal, but only whether th
interest requires maintaining the *status quo*
the Commission's determination of that questi
the courts of appeals will not be inundate
plications by the Commission. Such applicat
be made sparingly, because many merger c
proceed without preliminary relief and bec
Commission is mindful that the "all writs"
tion is an extraordinary power to be invoke
emergency situations.[21]

In sum, there is no danger that if the Co
is permitted to invoke the all-writs power
courts of appeals in merger cases the wor
those courts will be significantly increased
capacities strained; and they seem a
appropriate forum. Should experience pro
wise, Congress could readily provide for distr
rather than court of appeals proceedings
done in other areas.

CONCLUSION

The judgment of the court of appeals s
reversed and the case remanded for that cou

[21] In addition, the prospect of preliminary relief in
of appeals may be expected to encourage parties to C
merger cases to enter into voluntary agreements for m
separate operations which preserve the possibilit
scrambling the merged assets if the merger is final
be illegal.

cide the merits of the Commission's petition for a preliminary injunction.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
RICHARD A. POSNER,
Assistant to the Solicitor General.
HOWARD E. SHAPIRO,
EUGENE J. MEIGHER,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
JAMES B. TRULY,
Assistant General Counsel,
RICHARD H. STERN,
Attorney,
Federal Trade Commission.

MARCH 1966.

APPENDIX A

Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

JANUARY 21, 1966

ON APPLICATION FOR PRELIMINARY INJUNCTION

MR. JUSTICE CLARK:

After consultation with the Court I have determined to issue an order staying further action consummating the merger pending the disposition of a petition for certiorari by the Federal Trade Commission, provided such petition is filed within ten days. A form of order effectuating this opinion may be submitted by the parties.

TOM C. CLARK,
Associate Justice of the Supreme Court.

JANUARY 21, 1966.

APPENDIX B

Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON APPLICATION FOR PRELIMINARY INJUNCTION

ORDER

Upon consideration of the application of the Federal Trade Commission and the opposition submitted by Dean Foods Company and Bowman Dairy Company,

IT IS ORDERED, that Dean Foods Company and Bowfund Corporation, formerly known as Bowman Dairy Company, shall refrain from making any material changes, directly or indirectly, with respect to the capital stock or corporate structure of Bowfund Corporation, or with respect to the assets purchased by Dean from Bowman, pursuant to their agreement of December 13, 1965, as amended, including the operations and policies affecting those assets (other than changes made in the ordinary course of business), pending the filing on or before January 31, 1966, by

the Commission and determination by this Court of a petition for a writ of certiorari, provided, however, that nothing contained herein shall bar the sale or disposition of any of the retail delivery routes in the Chicago area upon such terms and conditions, and to such purchasers, as may be acceptable to the Federal Trade Commission. In making such sales and dispositions, if the purchasers wish to have Dean supply them with milk or other dairy products, Dean shall attempt to persuade them to purchase such milk or products under the Bowman label and to supply such milk or products from a processing plant or plants formerly operated by Bowman. In no event shall Dean sell such milk or other dairy products under the Dean label.

In the event the petition for certiorari is denied, the effect of this order shall terminate immediately. In the event the petition is granted, this order shall continue in effect subject to further order of the Court.

TOM C. CLARK,
Associate Justice of the Supreme Court.

JANUARY 24, 1966.

APPENDIX C

Section 1651(a) of the Judicial Code, 28 U.S
1651(a), provides:

> (a) The Supreme Court and all courts
> tablished by Act of Congress may issue
> writs necessary or appropriate in aid of t
> respective jurisdictions and agreeable to
> usages and principles of law.

Section 7 of the Clayton Act, as amended, 15 U.S
18, provides in pertinent part:

> No corporation engaged in commerce s
> acquire, directly or indirectly, the whole
> any part of the stock or other share cap
> and no corporation subject to the jurisdic
> of the Federal Trade Commission shall acq
> the whole or any part of the assets of anot
> corporation engaged also in commerce, wh
> in any line of commerce in any section of
> country, the effect of such acquisition may
> substantially to lessen competition, or to t
> to create a monopoly.

Section 11 of the Clayton Act, as amended,
U.S.C. 21, provides in pertinent part:

> (a) Authority to enforce compliance w
> sections 13, 14, 18, and 19 of this title by
> persons respectively subject thereto is ve
> in the Interstate Commerce Commission wh
> applicable to common carriers subject to
> Interstate Commerce Act, as amended; in
> Federal Communications Commission wh
> applicable to common carriers engaged in w
> or radio communication or radio transmis
> of energy; in the Civil Aeronautics Bo

where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or as-

sets, held or rid itself of the directors chose
contrary to the provisions of sections 18 an
19 of this title, if any there be, in the manne
and within the time fixed by said order. * *

(c) Any person required by such order of th
commission or board to cease and desist fro
any such violation may obtain a review of suc
order in the court of appeals of the Unite
States for any circuit within which such viol
tion occurred or within which such perso
resides or carries on business, by filing in th
court, within sixty days after the date of th
service of such order, a written petition pra
ing that the order of the commission or boar
be set aside. * * * Upon such filing of the pet
tion the court shall have jurisdiction of the pr
ceeding and of the question determined there
concurrently with the commission or board unt
the filing of the record, and shall have pow
to make and enter a decree affirming, modif
ing, or setting aside the order of the commi
sion or board, and enforcing the same to th
extent that such order is affirmed, and to issu
such writs as are ancillary to its jurisdiction
are necessary in its judgment to prevent injur
to the public or to competitors pendente lit
The findings of the commission or board as t
the facts, if supported by substantial evidenc
shall be conclusive. To the extent that th
order of the commission or board is affirme
the court shall issue its own order commandi
obedience to the terms of such order of th
commission or board. * * *

Section 15 of the Clayton Act, as amended, 15 U.S.
25, provides:

The several district courts of the Unite
States are invested with jurisdiction to preve
and restrain violations of this Act, and it sha
be the duty of the several United States atto
neys, in their respective districts, under th
direction of the Attorney General, to institu

proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

U.S. GOVERNMENT PRINTING OFFICE: 1949

RESPONDENT'S

BRIEF

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, *Petitioner*

v.

DEAN FOODS COMPANY AND
BOWMAN DAIRY COMPANY, *Respondents*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENT DEAN FOODS COMPANY

HAMMOND E. CHAFFETZ
WILLIAM R. JENTES
DONALD G. KEMPF, JR.
Attorneys for Respondent Dean Foods Company

Of Counsel:
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
2900 Prudential Plaza
Chicago, Illinois 60601
RAndolph 6-2929

Dated: March 21, 1966

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 970

FEDERAL TRADE COMMISSION, *Petitioner*

v.

DEAN FOODS COMPANY AND
BOWMAN DAIRY COMPANY, *Respondents*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENT DEAN FOODS COMPANY

QUESTIONS PRESENTED

The Commission misconceives the question presented as turning solely upon the power of the court of appeals to issue an extraordinary writ in aid of the court's jurisdiction, pursuant to Section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a). More properly, the question is whether the Commission, as a creature of statute, has standing to seek a preliminary injunction pending completion of its administrative hearings when Congress (1) has repeatedly refused to grant it that power and (2) has expressly limited the jurisdiction of the courts of appeals to grant relief *pendente lite* to cases where the Commission's hearings have been completed and a record has been filed for review.

In resolving this question, it is also appropriate
sider whether assumption by the courts of appeal
novel and intrusive task of conducting evidentiary h
in connection with applications for pre-hearing r
the Commission and other administrative agencie
be consonant with sound principles of judicial adm
tion and procedural due process.

Finally, quite apart from the Commission's
standing to proceed, a question is presented as to
this court's stay order should be vacated and the
for certiorari dismissed for the reasons, first, t
Commission's *prima facie* case has been completely
mined by the uncontroverted facts of record, lea
likelihood that it could prevail on the merits and,
that the stay is causing respondent Dean irre
injury.

STATEMENT

The Commission's Statement of the case would l
impression: (1) that Bowman, prior to the sale
operating assets to Dean, was essentially a sou
profitable company "despite some losses from it
operations" (Brief For The Federal Trade Com
hereafter "C.B.", 3); (2) that Dean, too, enjoyed a
able and growing" place in the dairy industry,
standing its "alleged" fear that "it might presen
its principal supermarket account" (C.B. 4, 6);
the very survival of smaller dairies in "the Chica
market, already highly concentrated" is threatened
acquisition (C.B. 3); (4) that respondents ente
their Purchase Agreement defying advice from th
mission's Staff that "the acquisition would raise
questions under the antitrust laws" (C.B. 3, 4);
that Dean, once permitted to proceed by the cour
peals, refused to "execute a further extension of the
date", and hastened to close the transaction before
peal could be perfected to this Court (C.B. 8).
point, the facts are quite to the contrary.

1. At the time Bowman reached its decision to sell its dairy operations to Dean, its financial and operating plight was an extreme one. In the Chicago metropolitan market, which the Commission states is "the relevant section of the country in which to test the competitive effects of the acquisition" (C.B. 31, n. 16), the following table shows that Bowman's sales had declined sharply during the preceding five years, while its operating losses had mounted at an alarming rate (R. 60):

	Sales	Operating Losses
1960	$56,796,962	($ 197,459)
1961	53,089,958	(678,127)
1962	52,628,675	(618,315)
1963	48,993,885	(617,841)
1964	46,596,008	(1,571,989)

Although the results outside Chicago had been less disastrous, Bowman had nonetheless reported a company-wide operating loss of $700,000 in 1964 (R. 59).[1]

Despite vigorous management efforts at rehabilitation during recent years, all indications pointed to a further deterioration in Bowman's already straitened condition. The continuing consumer trend toward store purchasing of milk had resulted in calamitous sales losses in home delivery, to which Bowman had long been heavily committed, particularly in Chicago. Its routes had dropped from a high of 2,200 to less than 500 (R. 59-61). Moreover, because Bowman had for so many years bent its efforts toward protecting its heavy investment in home delivery distribution, the retail store customers which it had secured were predominantly the less attractive, small volume ac-

1. The *de minimus* "overall profit" alluded to by the Commission (C.B. 3) was due solely to non-recurring income derived from the liquidation of plant, equipment and other assets and to non-operating profits from outside investments in marketable securities (R. 64).

counts (R. 62). Lacking a large and growing superm clientele, Bowman found itself unable to dispose home delivery business and still maintain enough v at the Chicago plant to secure minimal operating effic Indeed, despite the completion of a million dollar mo zation program at the Chicago plant in 1964—the plant where significant capital improvements had made—continued losses were anticipated. Outside Ch Bowman's plants were uniformly old, overcrowde in need of modernization (R. 62-64).

Frustrated in their efforts to devise any internal tion to the company's problems and confronted wi prospect of further sales declines and mounting ope losses, Bowman's management and shareholders con that an effort had to be made to find a buyer for the pany's dairy business and, in the event none was ava to effect a piecemeal self-liquidation as rapidly as po (R. 65, 66, 73-76).[2] Though the Commission assert "there was no evidence Bowman had made any eff obtain other purchasers" (C.B. 3), the record in fac closes that Bowman approached three dairy comp besides Dean, the only ones it reasonably believed be interested in making an offer (R. 66). Only Dea

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2. Bowman's stock was closely held, with nearly a third hands of two elderly widows, one of whom had recently die Senior Trust Officer for the Northern Trust Company of C which acts as Co-Executor, stated that it had "carefully an pendently evaluated [the] future income requirements" estate and had "concluded that the continued operation o man's dairy business on its present basis was unwarrante that these operations should preferably be sold as a packa if necessary, liquidated on a piecemeal basis and the fund erated from such a sale or liquidation re-invested elsewhere 73).

pressed any interest, however, and it was only willing to pay less than two-thirds of Bowman's net worth (R. 66).[3]

2. Although Dean, unlike Bowman, had shown a modest growth in recent years, mostly through entry into other food lines, both its sales and profits had declined in 1964 and, as a medium-sized regional dairy, it was dwarfed by the giant national firms. (Compare R. 68-70 with *Beatrice Foods Co.*, Trade Reg. Rep., 1963-1965 Transfer Binder, ¶17,244 at p. 22,325 (FTC 1965)). Moreover, over three-quarters of its Chicago business was with a single customer, Jewel Tea Company, which had recently disclosed its plans, conforming to a trend by other corporate and cooperative food chains, to open its own dairy plant and to terminate its supply arrangements with Dean (R. 70).[4] With the loss of the Jewel busines, Dean would have been forced to close several plants and others would have been left with substantial over-capacity (R. 70). It was to counter this severe threat to the continuation of its operations in the Chicago market that Dean decided to commit a sum equal to nearly its entire net worth to the purchase of Bowman's assets. Dean hoped that by disposing of Bowman's losing home delivery routes to smaller dairies who could operate them at a profit and by effecting cost-cutting consolidations of Dean and Bowman operations, it

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3. The Commission's claim that "at least one other dairy had an interest in acquiring Bowman and continuing its dairy operations" (C.B. 3) was thoroughly discredited before the court of appeals by evidence that this company had knowledge of Bowman's plans to sell nearly a month in advance of the contract with Dean, but gave no indication of its purported interest to anyone at Bowman at that time (R. 45).

4. For the current status of the Jewel account, see the confidential letter previously lodged with the Clerk.

could salvage enough Bowman and Dean business cago to permit a profitable operation (R. 70-71).

3. The Commission's Statement fails to disc despite a canvass of the Chicago market it found try witness to support in any way its position be court of appeals that competition would be adve fected by the acquisition. Nor does the Co disclose that respondents filed the affidavits of th tive Secretary of the Associated Milk Dealers of which represents substantially all dairies in the the General Manager of the Pure Milk Associati operative composed of dairy farmers supplying t part of the milk to the area, and the Chairman o land Co-Operative, a large independent retail gr operative, all of whom agreed that the acquisiti have no such effect (R.80-84). They established, *any contradiction by the Commission*, (a) that " farmers will not be affected by Bowman's sale of operations to Dean because prices to farmers a mined through a Federal order and a superpool" (b) that there is "no likelihood that Dean's acqui Bowman's dairy operations will give it the mark to charge other than competitive prices . . . [sin are many alternative milk suppliers" to whom c "could turn should this unlikely event occur" (c) that there are presently "a large number of a and vigorous dairies in the Chicago market and petition has been increasing rather than decreas 81); (d) that "if independent grocers . . . are t competitive with . . . vertically integrated chains their own dairies], they must be able to purch milk from efficient independent dairy compan Dean's purchase will enable it "to remain comp the dairy industry and to supply independent gro milk at the lowest possible prices" (R. 84); (e)

that the acquisition can have "nc conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally" (R. 81, 82-83, 84). In fact, Dean's plan to sell the former Bowman home delivery routes, which accounted for over 50% of Bowman's business in the Chicago area, to smaller dairies "will significantly strengthen the competitive vitality of these firms by giving them an opportunity to reduce their distribution and processing costs and increase their operating efficiency" (R. 81).

Also uncontradicted was the fact that (a) after Dean's sale of the former Bowman home delivery routes, which has already been substantially accomplished under the terms of this Court's stay, and (b) after the imminent loss of the Jewel account, Dean will have a market share in Chicago which is less than half the 23% market share allegedly accounted for by Dean and Bowman before the acquisition and well below the 16% which had been enjoyed by Bowman alone (R. 71). As a consequence, the acquisition will contribute to the trend toward declining concentration in the Chicago market, already evident in figures published by the Department of Agriculture, which also showed that of the 59 milk marketing areas for which the Department published statistics, Chicago was among the five least concentrated. Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS (rev. ed. April, 1964).

4. Six weeks prior to the formal execution of their Purchase Agreement, respondents, *on their own initiative,* brought to the attention of the Commission's Staff all of the material facts relating to the transaction which were later set forth in their affidavits filed with the court of appeals and to which reference is made in this Statement. This was done so that the Commission could have an

opportunity fully to investigate the proposed acquisition (R. 146-148). The Staff was then invited to suggest *any* modifications in the transaction short of its complete abandonment—and not merely the "divestiture of Bowman's retail home delivery milk routes", as the Commission suggests (C.B. 4)—which would make it acceptable to the Commission (R. 149). The Commission, however, declined to pursue discussions of any alternatives and, prefering to use the transaction as a "test case" with regard to its authority to proceed in the court of appeals, filed its administrative complaint and thereafter its emergency petition to the Seventh Circuit (R. 92, 149).

5. On January 19, 1966, the court of appeals, after oral argument and extensive briefs on both the merits and the jurisdictional issue, denied the Commission's petition on the ground that "the Commission did not have authority to institute this proceeding in this court" (R. 154). Further, the court vacated its previous order, which had stayed the closing until five days after entry of its judgment, thereby granting the respondents the right to close. When Bowman refused to extend the closing and tendered performance (R. 157), Dean had no alternative but to consummate the transaction, since the very condition on Dean's performance quoted by the Commission (C.B. 7, 8) reveals that it no longer applied following the lifting of the stay by the court of appeals.

SUMMARY OF ARGUMENT

On April 28, 1961, the Honorable Paul Rand Dixon, Chairman of the Federal Trade Commission, appeared before the House Antitrust Subcommittee to testify in support of legislation which would have granted the Commission the power to secure temporary injunctive relief in merger cases pending completion of the Commission's ad-

ministrative hearings. During the course of his testimony, the Chairman assured the Subcommittee that such legislation was of utmost importance since "the Commission presently . . . has no authority to prevent mergers or the mingling of assets after mergers have been consummated." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess. 85, 86 (1961). Calling particular attention to the decisions in *Federal Trade Commission* v. *International Paper Co.,* 241 F.2d 372 (2d Cir. 1956), and *Federal Trade Commission* v. *Farm Journal, Inc.* (3d Cir. 1955, unreported), which had denied the Commission authority "to preserve the status quo" under the "all writs" statute, the Chairman concluded: "*It is clear that the Commission has no such authority.*"[5] (*Id.* at 87.)

The Chairman could hardly have been faulted for his conclusion. The most exhaustive search of the antitrust statutes would have turned up no provision authorizing the Commission to seek pre-hearing relief in the merger field. The three preceding Congresses had rejected no less than fifteen amendatory proposals to grant the Commission that power, and the three succeeding ones were to deny another twenty-two. As the Chairman himself noted, two different Circuits had found the Commission's application to the courts of appeals for such relief to be without merit, and one of his predecessors had conceded to Congress that those decisions were correct. Finally, resort to the commentators would have disclosed that all were in accord with the Chairman's view: "It is clear that the Commission has no such authority."

Save for the Commission's expedient desire now to reverse its field, this respondent is aware of no change in

5. Emphasis has been added throughout this brief.

the controlling statutes or judicial precedents which wo
render either the Chairman's conclusion or the reas
supporting it less compelling today than they were in 19
On the contrary, the untoward results which would fl
from a transformation of the courts of appeals into e
dentiary tribunals for the hearing of preliminary inju
tion petitions suggest the impropriety of the Commissio
request that this Court overturn the deliberate refusal
Congress to grant the Commission pre-hearing relief.

I.

The courts of appeals are not only ill-equipped to assu
the unorthodox role of holding lengthy preliminary inju
tion hearings upon application by federal administrati
agencies, which the Commission seeks to impose upon th
but the assumption of this added burden would disru
the orderly disposition of their already over-taxed c
endars. The Commission's efforts to temper the radi
import of its proposal with the suggestion that such he
ings could be confined to affidavits alone, conflicts both w
settled preliminary injunction procedures and with t
actual experience of the district courts in merger ca
brought by the Department of Justice. There the tende
has been for the preliminary hearing, because it often lea
to an abandonment of the transaction if an injunction
sues, to take on all the essentials of a trial on the meri
Additionally, the procedure which the Commission asks t
Court to sanction presents a serious conflict with tra
tional principles of administrative justice. The Comm
sion's representation at the pre-hearing stage that
will probably find the respondents guilty of an antitr
violation—a representation which has already been ma
here and which must inevitably be made in future reque
for preliminary relief as well—threatens its ability fai
to hear the case on the merits. Since effective enforcem

of the antitrust laws can be accomplished, as it has been for over five decades, by a district court proceeding brought by the Department of Justice in the Commission's stead, no reason exists for the adoption of a procedure which is subject to such important procedural and substantive objections.

II.

Although the Commission is correct in suggesting that Congress contemplated a scheme of "dual enforcement" for many (though far from all) provisions of the antitrust laws, it has lost sight of the fact that Congress did not intend that the *methods* of enforcement to be employed by the Commission and the Department of Justice should be identical. On the contrary, the sole grant of authority to proceed before the courts for injunctive relief was to the Department of Justice. Congress limited the Commission's role to an administrative one. Indeed, the Commission was not even authorized to issue a complaint—as it has improperly done in this case—against a threatened violation of the antitrust laws.

Congress has, moreover, repeatedly refused to supply by amendment the authority which is so patently lacking in the existing statutory scheme. The prodigious volume of these amendatory proposals—thirty-seven during the past dozen years alone—and the extensive consideration given to them by Congress argue convincingly that they cannot be dismissed as mere "legislative inaction". Especially is this so since they have been accompanied by explicit and repeated recognition on the part of Congress, their sponsors and the Commission, itself, that absent such a specific grant of authority to the Commission, it has no power to obtain preliminary injunctive relief, either from the courts of appeals or elsewhere.

III.

Consistent with the Congressional design to confi
Commission to an administrative role in merger cas
with the unwisdom of converting the courts of appea
evidentiary tribunals, Congress has explicitly provide
the jurisdiction of those courts, not only with resp
review of Commission cease and desist orders, bu
with respect to relief *pendente lite*, shall attach only
the filing of a petition for review following a full ad
trative hearing. Significantly, when the provision r
ing relief *pendente lite* was added to the Clayton Act
Finality Act amendments in 1959, Congress chose exp
to retain this jurisdictional prerequisite, notwithst
the fact that the very committee which reported ou
amendatory legislation also had under considerati
the same time the Commission's request for pre-h
relief and was well aware that the Commission's
to secure such relief under the "all writs" statute ha
recently been rejected both by the Second and Thir
cuits. The decisions of this Court amply support th
clusion of those courts and of the court below that
Congress has so plainly manifested its intention
specific provisions of the antitrust laws that the
of appeals should not have jurisdiction to issue pr
nary relief, the generalized provisions of the "all
statute cannot be used to circumvent that Congres
limitation.

IV.

The Commission brought this case, and in turn ob
a stay, on the pretense that the sale of Bowman's ope
assets to Dean eliminated Bowman as a "viable compe
thereby increasing concentration in the Chicago
market, and that preliminary relief was essent
Bowman was to be reconstituted as a "going con

Since, however, the facts actually adduced before the court of appeals completely refuted these contentions, there is no basis for granting preliminary relief in any event, and the jurisdictional question posed by the Commission is purely hypothetical.

The unchallenged statements of Bowman's shareholders and management establish that the sale to Dean had no bearing on Bowman's decision to abandon its dairy business; the company's operating reverses had reached such proportions prior to the sale that its owners would have liquidated its dairy business in any event. Equally indisputable is the fact that Dean's disposition of the former Bowman home delivery routes (which was expressly excepted from this Court's stay), together with the imminent loss of Dean's largest customer in the Chicago area, will leave it with a market share only slightly larger than it had before the acquisition and well below half of that which was formerly accounted for by Dean and Bowman together. Finally, now that the transaction has been consummated and the home delivery routes are all but disposed of, there is not the remotest possibility of putting Bowman back in the dairy business; indeed, its owners would immediately effect a piecemeal self-liquidation if this were done in order to escape the crushing burden of the company's operating losses.

While the Seventh Circuit did not reach the merits of the Commission's petition, it is well settled that a reviewing court may affirm on any ground which will sustain the judgment below. Since the uncontroverted facts of record disclose no probability that the Commission could sustain its case on the merits, and any extension of the stay imposed by this Court will cause serious injury to Dean, we believe the writ of certiorari should be dismissed as improvidently granted or, in the alternative, that the judgment below should be affirmed.

ARGUMENT

I. SOUND PRINCIPLES OF JUDICIAL ADMINIS TION AND PROCEDURAL DUE PROCESS TATE THAT THE COURTS OF APPEALS SH NOT ASSUME THE CONDUCT OF PRELIMI INJUNCTION PROCEEDINGS.

The Commission rightly asserts that "this case pr a procedural question of major practical importa the administration of Section 7 of the amended C Act." (C.B. 13). That question, however, transcen Commission's jealous concern for securing a "co-equ forcement role" in merger cases. (C.B. 24). The rea is whether effective judicial administration, not only antitrust laws, but of all cases assigned to the cou appeals under the Federal system, is served by thr upon those courts the unorthodox and burdensome t sitting as trial courts for the conduct of prelimina junction proceedings, when Congress has provided a adequate alternative enforcement procedure throu application to the district courts by the Departm Justice.

A. The courts of appeals are ill-equipped to und the added burden of lengthy preliminary inju hearings.

Despite the Commission's effort to mask its extr nary request for preliminary injunctive relief as "a item of the courts of appeals' business" (C.B. 41), the mission cannot hide the far-reaching implications proposal that those courts undertake the type of evi ary hearings and fact-finding role which Congres lodged only in the district courts. What the Comm asks is no less than a revolutionary departure fro traditional appellate status of the courts of appeal

The instances cited by the Commission (C.B. 41, n. 20) of applications to the courts of appeals for a stay pending appeal from a ruling by the district court are scarcely in point here. It is one thing to pass upon an application for a stay *following a full hearing below;* it is quite another to conduct a preliminary injunction hearing in the first instance. In the former it may be appropriate to "resolve the factual issues" on affidavits and "without evidentiary hearings" as the Commission suggests (C.B. 41). But as pointed out by one of the very cases upon which the Commission relies, *Dunn* v. *Retail Clerks International Assn., Local 1529,* 299 F.2d 873, 874 (6th Cir. 1962), "the District Court could not grant an injunction without hearing the evidence" and the parties would be entitled to the same type of hearing were the courts of appeals to assume a similar role. "On the hearing for the [preliminary] injunction an adequate presentation of the facts is necessary. While the pleadings, if verified, and other affidavits are of service in determining the merits, the court should normally be reluctant to decide controverted factual issues in favor of the movant on the basis of affidavits alone." 7 Moore, FEDERAL PRACTICE ¶65.04, at 1638-39, and cases cited.

Certainly the experience of the district courts with preliminary injunction proceedings in merger cases brought by the Department of Justice affords no basis for concluding that they could be restricted to the perfunctory hearings envisaged by the Commission. On the contrary, the tendency has been for the preliminary hearing to partake of "all of the essentials of a trial on the merits." *United States* v. *FMC Corp.,* 218 F. Supp. 817, 823 (N.D. Cal. 1963), *appeal dismissed,* 321 F.2d 534 (9th Cir. 1963); *application for preliminary injunction denied,* 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers). This has been at-

tributable as much to the Government as to the defendants, since recent indications "seem to suggest a government attempt to set forth all available evidence at the hearing." Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 400 (1965).

For example, in *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa. 1963), *aff'd.* 320 F.2d 509 (3d Cir. 1963), the factual aspects of the government's claim for injunctive relief were so exhaustively documented and argued that the hearing lasted five days and the transcript ran to eight hundred pages. In *United States* v. *Penick & Ford, Ltd.*, 242 F. Supp. 518 (D.N.J. 1965), the government called six witnesses just to testify on the alleged impact of reciprocity in the starch industry. And even more recently, in *United States* v. *Pennzoil Co.*, 1966 Trade Cas. 81,958 (W.D. Pa. 1965), the hearing lasted six court days as every aspect of the proposed merger was extensively gone into by way of testimony and exhibit.

The development of the preliminary injunction hearing into an almost full dress trial is due in no small measure to the fact that it is often not merely the preliminary, but the *only* hearing in the case. Thus, in *United States* v. *Pennzoil, supra,* the government won a preliminary injunction on December 30, 1965, and by February 9, 1966, the defendants had abandoned the merger. The result was the same in *United States* v. *Ingersoll-Rand Co., supra; United States* v. *Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964); and *United States* v. *Parents Magazine Enterprises, Inc.*, 1962 Trade Cas. 76,757 (N.D. Ill. 1962), 1963 Trade Cas. 77,628 (N.D. Ill. 1963). Compare *United States* v. *Gimbel Brothers, Inc.*, 202 F. Supp. 779 (E.D. Wis. 1962), where the Department dropped its case following denial of preliminary relief.

Just as it cannot be assumed that the preliminary hearings will lend themselves to disposition on affidavits alone, it cannot be assumed that they will be limited solely to merger cases. Though the Commission suggests that similar relief will not be *"necessarily* available to other administrative agencies or with respect to other provisions of the Clayton Act" (C.B. 16), it is difficult to understand why such a gratuitous restriction should be adhered to if the Commission's Section 1651(a) theory has any merit here. In fact, the Commission has seemingly overlooked that even the instant case is grounded on the open-ended provisions of Section 5 of the Federal Trade Commission Act as well as Section 7 of the Clayton Act (R. 3, 7). Moreover, Chairman Dixon, during testimony before the House Antitrust Subcommittee, argued that preliminary relief is "necessary not only in merger cases but in all Commission actions in which cease and desist orders are issued." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess., ser. 5, at 93 (1961). As for the Commission's suggestion that its applications to the courts of appeals will be made "sparingly" (C.B. 42), there seems some inconsistency with its assertion elsewhere that the problem is of pressing importance and that a suit in its stead by the Department of Justice on these infrequent occasions is inadequate (C.B. 32-35).

It can hardly be disputed that the courts of appeals are singularly unprepared to assume the unprecedented task with which the Commission seeks to burden them. They have no fact-finding authority in proceedings brought by the Commission. *Federal Trade Commission* v. *Interna-*

tional Paper Co., 241 F.2d 372, 373 (2d Cir. 1956). No statute or rule governs venue or service of process. Compare 15 U.S.C. § 22.[6] Nor are the courts of appeals possessed of the sweeping subpoena power granted to the district courts in antitrust actions. Compare 15 U.S.C. §23. Most important, they have neither rules nor developed procedures for the holding of evidentiary hearings or the administration of pre-hearing discovery through depositions, interrogatories and motions to produce. Even Commission Chairman Dixon, while serving as Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, when informed by former Chairman Gwynne of the Commission's prior efforts to secure injunctive relief from the courts of appeals, remarked, "You were in the circuit court there, and ordinarily the circuit court is not a trial court." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee of the Judiciary*, 85th Cong., 2d Sess., at 45 (1958).

The prospect of imposing lengthy and complex preliminary injunction hearings upon the courts of appeals is especially ill-considered in view of their already crowded calendars. As the 1965 Annual Report of the Director of the Administrative Office of the United States Courts points out: "The United States courts of appeals and the United States district courts during the fiscal year 1965 were again unable to cope with the large volume of new judicial business. As a result cases pending in the courts at the end

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6. Although Section 11(c) of the Clayton Act provides that the respondent shall have the right to obtain review "in any circuit within which such violation occurred or within which such person resides or carries on business", it makes no mention of proceedings instituted by the Commission. 15 U.S.C. §21(c). See discussion at p. 22, *infra*.

of the year mounted to an all-time high." (p. I-1) With specific reference to the courts of appeals, the Administrative Office stated: "In the United States courts of appeals, 6,766 cases were docketed in 1965, an increase of 12 percent as compared with the 6,023 cases docketed during 1964. There were 5,771 cases disposed of during the year, 71 more than in 1964, but almost 1,000 less than the number of appeals docketed. Appeals pending on June 30, 1965 thus climbed to a record 4,775. In four years the volume of appeals docketed in the courts of appeals has risen more than 50 percent; pending cases have doubled." (p. I-2). To add to this workload the conduct of preliminary hearings on an emergency basis wherever an administrative agency seeks to preserve the *status quo* pending the completion of its hearings would clearly disrupt the courts' orderly disposition of their regular dockets.

B. The Commission's adversary role at the preliminary stage of this proceeding threatens its ability fairly to judge the case on the merits.

In addition to the conflict with the orderly administration of justice which the Commission's proposal raises for the courts of appeals, it presents a serious conflict with accepted principles of administrative justice insofar as respondents are concerned. In this case—as it necessarily must in future cases—the Commission has so committed itself to the respondents' guilt during the preliminary hearings before the court of appeals, that its ability subsequently to "act with entire impartiality" during the hearings on the merits is rendered suspect. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964); *Pillsbury Co.* v. *Federal Trade Commission*, 1966 Trade Cas. 81,891 (5th Cir. 1966).

The Commission has represented in its Emergency Petition that "it is probable that the Federal Trade Commission will enter an order finding a violation" (R. 4); its brief to the court of appeals asserted that "the conclusion is inescapable that the antitrust laws have been violated," (p. 11); its petition for certiorari maintained that it "appears likely [that] the Dean-Bowman merger [will be] found to violate Section 7," (p. 10); and its brief to this court concludes that the merger "is very probably illegal under Section 7." (C.B. 31).

Whether the Commission has thus disqualified itself from passing upon the Dean-Bowman acquisition is not presently at issue. What is at issue is acquiescence in a procedure which must inescapably force the Commission into public representations that the respondents will, at the very least, "probably" be found to have violated the antitrust laws. And this prior to any hearing either before the examiner or the full Commission.

Such derogation from administrative impartiality has been consistently inveighed against, both with respect to the Trade Commission and other agencies. See *e.g. Texaco, Inc.* v. *Federal Trade Commission, supra, Pillsbury Co.* v. *Federal Trade Commission, supra; Amos Treat & Co.* v. *S.E.C.*, 306 F. 2d 260 (D.C. Cir. 1962); and *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964). Particularly pertinent here is *Gilligan, Will & Co.* v. *S.E.C.*, 267 F. 2d 461 (2d Cir. 1959), where the court severely criticized the propriety of an SEC press release, issued in advance of hearing, which had stated that the respondents had violated Section 5 of the Securities Act of 1933. "Apart from ¶5 [of the Administrative Procedure Act] and the restrictions it may impose, the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from

which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 267 F. 2d at 468-9.[7]

Commission Chairman Dixon himself has recognized that, were the Commission given authority to seek preliminary relief, it would "then become both an administrative agency, and we might say, a prosecuting agency in that respect." *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess., at 51 (1958). This problem is, of course, not present with respect to requests for preliminary relief by the Department of Justice, an agency not burdened with the responsibility of judicial determination.[8] It is apparent, therefore, that in its drive to gain "co-equal" status with the Department, the Commission asks this Court to increase its executive efficacy at the sacrifice of its judicial impartiality.

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7. This Court need not be concerned, as it was in *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948), that disqualification of the Commission in the instant type of proceeding will bar all enforcement activity, since the Department of Justice is well equipped to secure from the district courts the identical relief requested by the Commission (see pp. 22-26, *infra*).

8. Nor is it present in those limited instances where Congress has seen fit to grant the Commission, rather than the Department, the authority to seek preliminary injunctions from the district courts, since the Commission is required to show only that it has "reason to believe" the law is being violated in those instances. See Section 13 of the Federal Trade Commission Act, 15 U.S.C. §53; Section 7(b) of the Wool Products Labeling Act of 1939, 15 U.S.C. §68e(b); Section 9(b) of the Fur Products Labeling Act, 15 U.S.C. §69g(b); Section 6(a) of the Flammable Fabrics Act, 15 U.S.C. §1195(a); Section 8 of the Textile Fiber Products Identification Act, 15 U.S.C. §70f.

In addition, the procedure which the Commission asks this Court to sanction effectively destroys the right which Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act confer on the respondent to choose the court of appeals in which it will seek review of a Commission cease and desist order. Both statutes provide that the respondent may obtain review in "any circuit within which such violation occurred or within which such person resides or carries on business." 15 U.S.C. §§21(c), 45(c). Here, for example, those provisions would permit the respondent to select from among any one of three Circuits. Yet the Commission, by bringing its emergency petition in the Seventh Circut, has, as a practical matter, settled eventual review in that court in contravention of the express intent of Congress that the decision should be the respondent's.

C. No reason exists for adoption of the Commission's radical procedure, since effective enforcement of the antitrust laws can be accomplished by preliminary injunction proceedings brought by the Department of Justice before the district courts.

In contrast to the important procedural and substantive objections which may be made to the Commission's proposal, the reasons "of policy" which it has adduced for its adoption (C.B. 22, *et seq.*) do not withstand analysis. The Commission is met at each turn with the undeniable fact that effective enforcement of the antitrust laws can be obtained, as it has been for over five decades, by a district court proceeding brought by the Department of Justice in the Commission's stead.

The Commission's lengthy disquisition upon the need for injunctive relief in merger cases (C.B. 27-31) misses the

point. The Commission is compelled to concede "that Section 15 of the Clayton Act empowers the Department of Justice to obtain such relief" in the very type of cases to which it alludes (C.B. 32). Consequently, denial of the relief requested by the Commission here does not leave the Government agencies without a remedy.[9]

Nor can the Commission seriously contend that the Department is ill-equipped to bring suit in merger cases. Though the Commission would like to believe that "from the outset it was the Commision that bore the primary, and virtually exclusive, enforcement responsibility" for Section 7 (C.B. 24), it can hardly be denied that the Department, both quantitatively and qualitatively, has had an important impact on merger enforcement. In fact, all of the significant merger cases before this Court in recent years were instituted by the Department. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962); *United States* v. *E. I. DuPont de Nemours*, 353 U.S. 586 (1957); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) —to mention only those cases which the Commission itself cites.

The Commission is also in no position to dispute the Department's expertise in the dairy industry. The Department, as much as the Commission, has had "a long history of experience and concern with the competitive problems

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9. Furthermore, the Commission's contention (C.B. 27, 28) that effective merger enforcement is "meaningless without the power to order divestiture" conflicts with one of its most recent merger decisions, *National Tea Co.*, Dkt. 7453 (March 4, 1966), where, despite a finding of illegality, it concluded that "a lesser remedy will suffice" (p. 16).

of this industry" (C.B. 34). See, *e.g., Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951); *United States* v. *Borden Co.,* 347 U.S. 514 (1954); *United States* v. *National Dairy Corp.,* 372 U.S. 29 (1963); and *Beatrice Foods Co.* v. *United States,* 312 F.2d 29 (8th Cir. 1963), *cert. den.* 373 U.S. 904 (1963).

It is thus apparent that the "fully effective enforcement of the merger law" (C.B. 16) is not really in issue, since the Department is fully capable of securing adequate relief on the Commission's behalf. The Commission's argument shifts, therefore, to the contention that if the Department proceeds in the Commission's stead, the Commission's "special knowledge and extensive experience" will allegedly be lost (C.B. 26). But the long record of cooperation between the two agencies affords no indication that this has been a matter of practical concern. On the contrary, during his appearance before the House Antitrust Subcommittee in 1957, the then Attorney General, Herbert Brownell, remarked that "under the present law, of course, we work it out that if a preliminary injunction seems to be required, whether the matter first comes to the attention of the FTC or ourselves, we cooperate with them and bring the necessary action so that it is not as though the situation were critical or anything of that sort, because by liaison machinery we can work this out." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 85th Cong., 1st Sess., ser. 2, at 65 (1957). Moreover, since at least 1948 the Commission and the Department have operated under an informal agreement whereby "the question of which agency should proceed is submitted to a joint conference." REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAW 376 (1955). Indeed, in this very case such a conference was held between the two agencies in

advance of the filing of the Commission's emergency petition (R. 97).

Furthermore, Congress clearly anticipated that cooperation between the two agencies would be required and set up the statutory machinery whereby the Commission's expertise could be brought to bear in cases instituted by the Department. In Section 7 of the Federal Trade Commission Act, Congress provided that "in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon conclusion of the testimony therein, if it shall be then of the opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein." 15 U.S.C. §47. The legislative history confirms that this provision was specifically enacted to "bring both to the Attorney General and to the court the aid of special expert experience and training" which the Commission might acquire. S. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914). Similarly, the House Report noted that "the commission, as an independent body of specialists, will . . . have placed upon it the proper burden of framing the plans for the effective segregation and readjustment of unlawful combinations. . . ." H. R. Rep. No. 533, 63d Cong., 2d Sess. 6 (1914). Additionally, in Section 6(c) Congress made provision for cooperation between the Commission and the Department in enforcing compliance with such orders. 15 U.S.C. §46(c).[10]

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10. The cooperative scheme envisioned by Congress was a reciprocal one. Section 8 of the Federal Trade Commission Act authorizes the transfer of both personnel and records by the Department to the Commission to assist the latter in its enforcement efforts. 15 U.S.C. §48. See, also, Section 11(b) of the Clayton Act authorizing intervention by the Department in proceedings brought by the Commission. 15 U.S.C. §21(b).

Upon analysis, then, each of the reasons advanced by the Commission for resort to the revolutionary procedure it advocates, is found to be chimerical. Accordingly, even were the evidence accumulated in Parts II and III, *infra*, less conclusive of Congress' intent to deny the Commission the right to pre-hearing relief, the Commission has clearly failed to suggest any convincing rationale for resort to the extraordinary procedure it proposes. In sum, the Commission's proposal is nothing more than an effort to increase the Commission's authority at the expense of sound judicial administration by imposing upon the courts of appeals a type of proceeding for which they are ill-suited in an instance where Congress has established an alternative procedure for the securing of identical relief from the district courts.

II. CONGRESS HAS CONSCIOUSLY WITHHELD FROM THE COMMISSION ANY STANDING TO OBTAIN THE TYPE OF PRELIMINARY INJUNCTIVE RELIEF REQUESTED IN THIS CASE.

The Commission repeatedly expresses the issue before this Court in terms of the power of the courts of appeals to grant a writ under Section 1651(a) (C.B. 2). In so doing, it has overlooked an important and, as it turns out, determinative threshold consideration—whether Congress has given the Commission any standing to sue.

As a creature of statute, "the Commission exercises *only* the administrative functions delegated to it by" Congress. *Federal Trade Commission* v. *Eastman Kodak Co.* 274, U.S. 619, 623 (1927); *Humphrey's Executor* v. *United States,* 295 U.S. 622, 628 (1935). The presumption, therefore, is not that the Commission has standing to sue where Congress has failed to provide otherwise. On the contrary, the Commission must point to a specific legislative grant authorizing it to proceed. Yet the Commission's brief may be searched in vain for a citation to any statute granting

the Commission standing to sue for preliminary injunctive relief in merger cases.[11]

The case against the Commission rests on far more than legislative inaction, however. An examination of the statutory scheme adopted for the enforcement of the antitrust laws, together with its legislative history, presents overwhelming evidence of a conscious decision by Congress to withhold from the Commission any standing to obtain a preliminary injunction in the instant case.

A. Congress made no provision for preliminary injunctive relief at the behest of the Commission in the statutory scheme which it adopted for the enforcement of the antitrust laws.

The Commission correctly observes that when Congress enacted Section 7 of the Clayton Act it envisioned a scheme of "dual enforcement" (C.B. 13). Where the Commission misreads both the statute and its legislative history is in its argument that "dual" implies "co-equal" (C.B. 26). When Section 7 is read in the context of the full panoply of antitrust and related statutes committed to the Commission and to the Department of Justice for enforcement, it becomes readily apparent that Congress did not intend identical enforcement powers for the two agencies.[12]

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11. Congress has also provided in Section 2 of the Administrative Procedure Act that the agency must act within the confines of its own published rules. 15 U.S.C. §1002. The Commission's rules, however, make no allowance for the instant type of proceeding.

12. The Commission's attempted reading of Section 7 *in vacuo* does violence to the repeated admonition of this Court that the Sherman, Clayton and Federal Trade Commission Acts must be considered as a interrelated statutory scheme. *Cf.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Federal Trade Commission* v. *Motion Picture Adv. Co.*, 344 U.S. 392 (1953); *Federal Trade Commission* v. *Cement Institute*, 343 U.S. 683 (1948). Moreover, the Commission cannot escape the fact that both its administrative complaint and its emergency petition to the court of appeals were grounded on Section 5 of the Federal Trade Commission Act as well as Section 7 of the Clayton Act. (R. 3, 7).

Although Congress gave the Department of Justice and the Commission "dual authority" to enforce many (though far from all) provisions of the antitrust laws, Congress prescribed quite disparate methods of enforcement for the two agencies. The Department was authorized to proceed judicially, while the Commission was authorized to proceed administratively.

Thus, Congress assigned to the Department of Justice the task of criminal prosecution under Sections 1 through 3 of the Sherman Act, 15 U.S.C. §§1-3, the right to recover damages on behalf of the United States under Section 4A of the Clayton Act, 15 U.S.C. §15(a), and the power to obtain equitable relief, including injunctions against threatened violations of the antitrust laws, under Section 4 of the Sherman Act, 15 U.S.C. §4, and Section 15 of the Clayton Act, 15 U.S.C. §25. Even in the Federal Trade Commission Act, where Congress gave the Commission primary enforcement authority, it made specific provision for the Department of Justice to proceed on the Commission's behalf where resort to the courts was required under Section 9 to obtain "writs of mandamus commanding any person or corporation to comply with the provisions of [the Act] or any order of the commission made in pursuance thereof" and under Sections 10 and 16 for the recovery of penalties for non-compliance with Commission orders. 15 U.S.C. §§49, 50 and 56.[13]

The sole grant of enforcement authority which Congress made to the Commission is contained in Section 11 of the Clayton Act, 15 U.S.C. § 21 and Section 5 of the Federal

13. The Department of Justice is also authorized to sue for the penalties provided for in Section 10 of the Wool Products Labeling Act, 15 U.S.C. §68h, Section 11 of the Fur Products Labeling Act, 15 U.S.C. §69i and Section 11 of the Textile Fiber Products Identification Act, 15 U.S.C. §70i.

Trade Commission Act, 15 U.S.C. § 45. Despite the elaborate detail with which the enforcement powers of the Commission were spelled out in those two sections, not one word, either expressly or inferentially, gives the Commission the right to apply to any court for preliminary relief pending the completion of the Commission's administrative proceedings.

So clear was Congress' intent that the Commission should not have the right to enjoin threatened violations of the antitrust laws, that it did not even authorize the Commission to issue a complaint—as it improperly did in this case—until a violation had actually occurred. Section 11(b) expressly states that a complaint may issue only where the respondent "is violating or has violated" the Clayton Act. 15 U.S.C. §21(b). Similar language appears in Section 5(b) of the Federal Trade Commission Act. 15 U.S.C. §45(b).[14]

The Commission has attempted to foreclose examination of the Congressional intent behind the disparate enforcement procedures which Congress so carefully fashioned when it enacted the Clayton and Federal Trade Commission Acts with the contention that their legislative history is "obscure" and "sheds little light on how Congress intended

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14. The Commission, itself, has recognized its lack of authority to file a complaint prior to the consummation of a merger. See, *e.g., Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., at 53-54 (1958). See, also, Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 404 (1965): "The FTC cannot even issue its complaint until a merger or acquisition has been consummated; it has no power to block a merger entirely." *Cf. United States* v. *Union Oil Co.*, 343 F. 2d 29, 31 (9th Cir. 1965): "Under Section 7 of the Clayton Act an acquisition can be a violation—a proposed acquisition cannot."

the dual enforcement jurisdiction [which] it was creating to operate." (C.B. 24, n. 8) Far from being "obscure", the legislative history, especially of the Federal Trade Commission Act, confirms that Congress wished the Commission to play a limited and carefully circumscribed role in the Congressional scheme of dual enforcement. As finally enacted, the Federal Trade Commission Act reflected a compromise between those who would have restricted the proposed Commission to a mere information-gathering agency (H.R. 15613, the bill as originally passed by the House, would have limited the agency to this narrow role) and those who would have armed the proposed Commission with sweeping enforcement powers co-equal to those of the Department of Justice. See generally Henderson, THE FEDERAL TRADE COMMISSION 19-27 (1924). Indeed, the Congressional Reports were careful to point out that the Commission was being given limited powers and that, while time might indicate the need for new legislation increasing the Commission's powers, "such legislation should come by a sound process of evolution." H.R. Rep. No. 533, 63d Cong., 2d Sess. 8 (1914); S. Rep. No. 597, 63d Cong., 2d Sess. 10 (1914).

B. Congress has repeatedly refused to amend the antitrust laws to give the Commission the right to obtain preliminary relief in merger cases.

Not only did Congress consciously withhold from the Commission any authority to seek preliminary relief in the statutory scheme as originally enacted, it has repeatedly refused to adopt amendatory legislation which would have granted the Commission such authority. During the past twelve years, amendatory legislation which would have granted the Commission the power to obtain preliminary injunctions in merger cases has been introduced in every

Congress from the 84th through the 89th. The total number of bills has been staggering—thirty-seven in all:

84th Congress	85th Congress	86th Congress
S. 3341	S. 198	S. 442
S. 3424	S. 722	S. 2693
H.R. 6748	S. 3479	
H.R. 7229	H.R. 264	
H.R. 9424	H.R. 2143	
H.R. 9968	H.R. 7698	
	H.R. 10196	

87th Congress		88th Congress	89th Congress
S. 166	H.R. 4008	H.R. 594	H.R. 49
S. 2552	H.R. 5624	H.R. 1105	H.R. 1574
H.R. 145	H.R. 6058	H.R. 9941	
H.R. 1181	H.R. 6697		
H.R. 1233	H.R. 6698		
H.R. 1817	H.R. 8317		
H.R. 2282	H.R. 8830		
H.R. 3563	H.R. 8831		
	H.R. 12032		

Not one, however, gained final Congressional approval.[15]

The steadfast refusal by Congress to enact legislation granting the Commission authority to seek pre-hearing relief can hardly be dismissed as Congressional inaction (C.B. 40). Extensive hearings, the reports of which fill five volumes, were held on these legislative proposals during

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15. The Commission's observation (C. B. 40) that these bills would have granted it the right to seek preliminary injunctive relief from the district courts or to issue such injunctions on its own, rather than the right to apply to the courts of appeals for such relief, serves only to underscore the Commission's own recognition that the courts of appeals are an inappropriate forum for the hearing of preliminary injunction proceedings. (See pp. 14-19, *supra*.)

the 84th, 85th and 87th Congresses. *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., ser. 15 (1956); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., (1956); *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 85th Cong., 1st Sess., ser. 2 (1957); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958); *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess., ser. 5 (1961). No less than four Congressional Reports were issued in connection with the proposed legislation. H.R. Rep. No. 1889, 84th Cong., 2d Sess. (1956); S. Rep. No. 2817, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 486, 85th Cong., 1st Sess. (1957); S. Rep. No. 132, 85th Cong., 1st Sess. (1957). Running throughout is explicit and repeated Congressional recognition that, absent such amendatory legislation, the Commission had no power to obtain preliminary injunctive relief in merger cases. Nowhere is there evidence to support the Commission's fanciful belief that the generalized provisions of Section 1651(a) were thought by Congress to provide a residuum of statutory authority upon which the Commission could draw for proceeding in the courts of appeals.

Quite the contrary, the Commission's lack of standing to obtain preliminary relief was considered to be absolute. For example, H.R. No. 1889, 84th Cong., 2d Sess. 4 (1956) stressed the "lack of a provision to enable the Commission to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of proceedings." Similarly, the Staff Report of the Senate Subcommittee on Antitrust and Monopoly remarked that "the Federal Trade Commission now lacks the power to seek restraining action of a court to prevent

consummation of a proposed merger or acquisition or to maintain the status quo." It observed, however, that the Commission "does have the right to request the Attorney General to seek such action on its behalf." S. Rep. No. 132, 85th Cong., 1st Sess. 53 (1957). See, also, S. Rep. No. 2817, 84th Cong., 2d Sess. 12 (1956) and H.R. No. 486, 85th Cong., 1st Sess. 2-3 (1957). In making these observations Congress was well aware of the Commission's unsuccessful efforts to use Section 1651(a) as a means of securing injunctive relief. See, *e.g.*, H.R. Rep. No. 486, 85th Cong., 1st Sess. 8-9 (1957); see, also, pp. 43, 44, *infra*.

Those who testified in support of the proposed amendments were equally of the view that only amendatory legislation could give the Commission authority to obtain preliminary relief against challenged mergers. Representative Patman stated categorically that "the Federal Trade Commission has no power to stop a merger before it takes place" (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 11-12 (1956)); Senator Sparkman observed that "existing law prevents the Commission from moving against mergers prior to consummation and also, from taking action, after consummation, to preserve the status quo pending completion of administrative proceedings before the Commission" (*id.* at 49); and Representative Celler concluded that "equally as necessary as premerger notification is the provision giving the Federal Trade Commission authority to seek a preliminary court injunction to prevent consummation of mergers or after consummation, to preserve the status quo until completion of administrative proceedings before the Commission" (*Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at 123 (1956)).

Even the Commission represented to Congress that amendatory legislation was required to give it the authority it presently professes to possess. For the Commission now to assert (C.B. 40) that it merely "implied" that it lacked such power is, to put it politely, an understatement. The then Chairman of the Commission, Judge Gwynne, could hardly have been more explicit when he advised the Senate Subcommittee on Antitrust and Monopoly in 1956 that there was no "provision which enables the Federal Trade Commission either to take action to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., at 465 (1956). This followed Chairman Gwynne's earlier statement to the House Antitrust Subcommittee that "the greatest need for amendatory legislation is evident in section 7" where "the Commission must be given additional powers. Basic among these [is] . . . the authority to take action to prevent certain mergers before they are consummated." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., ser. 15, at 28 (1956).

These same views were expressed by present Chairman Dixon when he told the House Antitrust Subcommittee in 1961 that "the Commission . . . has no authority to prevent mergers or the mingling of assets after mergers have been consummated." *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 87th Cong., 1st Sess., ser. 5, at 85-86 (1961). Similar representations were made to the antitrust bar when Chairman Dixon wrote that the Commission lacked "means to obtain injunctions or to maintain the status quo in section 7 cases" and that, accordingly, the Commission had "strongly supported legislation which would amend the Clayton Act to

give it authority to obtain preliminary injunctions in the merger cases." Dixon, *Recent Developments in Federal Trade Commission Enforcement,* 18 A.B.A. Sect. Antitrust L. 107, 114 (1961). See also Dixon, *Significant New Commission Developments,* 21 A.B.A. Sect. Antitrust L. 247, 255 (1962).

Former Commission Chairman Kintner also wrote extensively concerning the "objective which the Commission has sought during 1960 and other years *without success* . . . the drive to secure an amendment to the Clayton Act authorizing the Commission to seek preliminary injunctions" against proposed mergers so that the Commission would not be remitted to seeking the assistance "of the Antitrust Division in . . . instances where a temporary restraining order is peculiarly appropriate." Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra,* 1961 Antitrust Law Symposium 21, 41. And see Kintner, *Developments in Congress of Special Interest to the Federal Trade Commission,* 15 A.B.A. Sect. Antitrust 198, 200 (1959); Kintner, *Developments Under the Anti-Merger Act and Other Aspects of the Federal Trade Commission,* 5 Antitrust Bull. 387, 388 (1960); Kintner, *What's Ahead in Section 7 Enforcement,* 39 U. Det. L. J. 153, 206-207 (1961).

Thus, each of the last three Chairmen of the Commission has recognized on numerous occasions that, absent amendatory legislation by Congress, the Commission lacks authority to seek preliminary relief. Additionally, the Commission's Annual Reports have repeatedly stressed the Commission's ambition to secure amendatory legislation and have noted that "in the absence of such Commission authority, corporations may now complete their merger arrangements or may dispose of assets acquired through

merger in the face of pending Commission proceedings." 1958 Fed. Trade Comm. Ann. Rep. 63-64. The Commission's current report again calls attention to the need for legislation authorizing it to obtain pre-hearing injunctive relief. 1964 Fed. Trade Comm. Ann. Rep. 33.[16]

The Commentators have, without exception, agreed that the Commission has no standing to seek preliminary relief. Indeed, it has been pointed out that "the F.T.C. can, when it wants to enjoin a merger that might violate Section 7, ask the Department of Justice to exercise its authority to sue for an injunction. Yet, it apparently has not made such requests. Instead, it has asked Congress for the power to sue for an injunction on its own." Massel, COMPETITION AND MONOPOLY, LEGAL AND ECONOMIC ISSUES 54, 319 (1962). See, also, Kaysen & Turner, ANTITRUST POLICY 258 (1959); Kronstein, Miller and Schwartz, MODERN AMERICAN ANTITRUST LAW, A GUIDE TO ITS DOMESTIC AND FOREIGN APPLICATION 75-79 (1958); Martin, MERGERS AND THE CLAYTON ACT 303-304 (1959); Comment, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act,* 40 N.Y.U. L. Rev. 771 (1965); Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. 391, 402-405 (1965); Comment, 32 N.Y.U. L. Rev. 1297 (1957).

Notwithstanding this uniform recognition by Congress, the Commission, the commenators and (as will be shown, *infra*) the courts, that the Commission has no standing to obtain preliminary injunctive relief in a merger case, either from the courts of appeals or elsewhere, Congress has not seen fit to grant the Commission that power.[17] This

16. It appears unreasonable to assume that the Commission would have expended such effort to secure legislation which it now argues is superfluous.

17. The House did pass H.R. 9424 in 1956, but it failed to gain the approval of the Senate.

despite the fact, shown by the following comparison, that Congress was presented with the very same arguments in support of the amendatory proposals which are now presented to this Court:

"[T]he Federal Trade Commission cannot effectively play its role in the antitrust field without authority to secure injunctive relief." (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 5, at 43 (1961))	"The Commission cannot fulfill its intended role in section 7 enforcement if denied the power to obtain preliminary relief. . . ." (C.B. 27)
"[I]n many mergers the acquired competitor is completely swallowed up and . . . [i]t is practically impossible thereafter to restore completely the preexisting competitive situation." (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 29 (1956))	"[T]he operations of the acquired company may be so completely mingled with those of the acquiring that it is impossible to disentangle them." (C.B. 30)
"Since the Federal Trade Commission has concurrent responsibility with the Attorney General to enforce that act, logic and policy dictate that the Commission have coextensive authority. . . ." (*Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at 124 (1956))	"Congress intended the Commission to play an effective enforcement role, fully co-equal with the Department of Justice. • • • The system is gravely undermined if . . . only the Department may obtain preliminary relief in a merger case." (C.B. 11)
"[E]ffective administration of the AntiMerger Act requires that the Commission be given . . . authority to take action to prevent certain mergers before they are consummated." (*Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 28 (1956))	"[T]he availability to the Commission of preliminary relief in appropriate cases is essential to the Commission's merger enforcement program. . . ." (C.B. 27)

The legislative rejection of these contentions, which has been manifested by the repeated refusal of Congress to amend the antitrust statutes to grant the Commission the power to obtain preliminary injunctive relief, precludes their reargument before this Court. As this Court pointed out in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 479 (1952), "effective enforcement of the Clayton Act by the Commission may be handicapped by the present provision, but that is a question of policy for Congress." See, also, *Commissioner* v. *Brown*, 380 U.S. 563 (1965), and *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953).[18]

C. In contrast to the merger field, Congress has expressly granted the Commission authority to seek preliminary injunctions in other carefully circumscribed areas.

The refusal by Congress to accord the Commission any broad power to obtain preliminary injunctive relief takes on added significance when contrasted with the explicit grant of such power to the Commission which Congress

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18. There is no merit to the Commission's argument that the 1950 amendments to the Clayton Act were intended in any way to grant it "co-equal" powers with the Justice Department. While the Commission flatters itself with the notion that "the legislators thought primarily in terms of strengthening the Commission's powers" (C.B. 25), the simple fact is that the purpose of the 1950 amendments was to close a long-standing loophole in the Clayton Act by amending "section 7 so as to prohibit the acquisition of assets as well as stock of a competing corporation." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 5 (1949), and see S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950). To the extent that this loophole was closed, there was a "strengthening" of the powers of all enforcement agencies. Indeed, if Congress singled out any particular enforcement agency for a special "strengthening" of powers, it was the Department of Justice, which was authorized "to intervene and appear in any proceeding brought by any Commission, Authority or Board to enforce sections 2, 3, 7, or 8 of the Clayton Act." S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).

has made in certain limited areas. For example, Congress amended Section 13 of the Federal Trade Commission Act in 1938 to provide that the Commission should have the right to apply to the district courts for temporary injunctions pending the completion of administrative proceedings involving the dissemination of false advertising. 15 U.S.C. §53. Congress also made express provision for the Commission's right to sue for preliminary relief in the Wool Products Labeling Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953 and the Textile Fibre Products Identification Act of 1958. 15 U.S.C. §§68e, 69i, 70i and 1195.

Thus, on at least five occasions since the enactment of the Clayton and Federal Trade Commission Acts in 1914, Congress has acted to grant the Commission the express power to obtain preliminary relief. It is evident, therefore, that where Congress wished the Commission to have the right to such relief, it specifically so provided. It is equally apparent that Congress did not believe the "all writs" statute conferred such authority on the Commission absent a specific legislative grant. Finally, where Congress has authorized the Commission to proceed, it has been before the district courts, not the courts of appeals.

The Commission argues, however, that Section 13 of the Federal Trade Commission Act has "nothing to do" with the proper interpretation of the Commission's powers under other provisions of that Act or the Clayton Act (C.B. 38). But the Commission loses sight of the fact that Section 13 was made an integral part of the Federal Trade Commission Act, as amended. Indeed, "false advertising" is expressly declared by Section 12 of the Act to be "an unfair or deceptive act or practice in commerce within the meaning" of Section 5, one of the two statutory bases for the Commission's complaint in this case. See 15 U.S.C. §52.

Similarly, the Wool, Fur, Textile and Flammable Fabrics Acts cannot be swept aside as having no bearing on the Commission's power to seek preliminary injunctive relief for alleged violations of Section 7 of the Clayton Act and Section 5 of the FTC Act. On the contrary, they offer a revealing insight into Congress' intent with respect to the Commission's injunctive powers. Section 6 of the Wool Products Labeling Act, for example, provides that the Commission is authorized "to prevent any person from violating the provisions [of the Act] . . . in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of" the Act. 15 U.S.C. §68d. Similar provisions appear in the other Acts. 15 U.S.C. §§69f, 70e and 1194. Despite these sweeping incorporations of the Federal Trade Commission Act, Congress felt it necessary in each case explicitly to grant the Commission the right to seek injunctive relief.[19]

Thus, the affirmative action which Congress has taken specifically to grant the Commission authority to proceed in these limited areas reinforces the conclusion that, absent such an express grant, Congress neither believed nor intended that the Commission could obtain pre-hearing relief.

III. THE ALL WRITS STATUTE MAY NOT BE USED TO CIRCUMVENT THE LIMITS ON COMMISSION AND JUDICIAL POWER WHICH CONGRESS HAS IMPOSED.

The court below was patently correct in concluding that the Commission's lack of "authority to institute this pro-

19. Congress has been equally specific when it wished to authorize other administrative agencies to obtain preliminary injunctive relief. See, *e.g.*, 49 U.S.C. §§5(9), 43 (ICC); 29 U.S.C.§160(j), (1) (NLRB); 16 U.S.C. §825m(a) (FPC); 15 U.S.C. §77t(b) (SEC); 15 U.S.C. §78u(e) (SEC); 49 U.S.C. §1487(a) (CAB).

ceeding" is dispositive of the case (R. 154). Whatever the effect of the "all writs" statute on the power of the courts, it adds nothing to the power of the Commission. The Commission's position would not be advanced, however, even if the issue were the power of the courts of appeals to issue a writ under Section 1651(a). Congress has been as precise in withholding from the courts of appeals any jurisdiction to issue preliminary injunctions pending completion of the Commission's hearings and order as it has been in denying the Commission the standing to seek such relief. Since the office of an extraordinary writ is to protect, not to expand, the jurisdiction which Congress has conferred on the courts, the "all writs" statute does not avail the Commission in any event.

Only recently, this Court remarked in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964), that "extraordinary writs are 'reserved for really extraordinary causes,' *Ex parte Fahey*, 332 U.S. 258, 260 (1947)." By the terms of the statute, such writs must be "in aid of" the jurisdiction of the court which Congress has conferred. 28 U.S.C. §1651(a). The statute "does not enlarge or expand" that jurisdiction "but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the courts." *United States* v. *First Federal Savings and Loan Ass'n.*, 248 F.2d 804 (7th Cir. 1957). It is because a Section 1651(a) writ cannot be employed to circumvent express Congressional limitations on judicial power that this Court has repeatedly recognized that "where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions. . . ." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943). See also *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379 (1953); *Parr* v. *United States*, 351 U.S. 513 (1956).

Here, Congress has explicitly established that the jurisdiction of the courts of appeals over proceedings instituted by the Commission shall attach only after full administrative hearing, the entry of a cease and desist order and the filing of a petition for review. Section 11(c) of the Clayton Act states unequivocally: "*Upon such filing of the petition* the court shall have jurisdiction of the proceeding. . . ." 15 U.S.C. §21(c). Identical language appears in Section 5(c) of the Federal Trade Commission Act. 15 U.S.C. §45(c).

This limitation on the jurisdiction of the court of appeals applies not only to its jurisdiction over the case on the merits, but also to its jurisdiction to issue relief *pendente lite*. Both Sections 11(c) and 5(c) specifically provide that the jurisdiction of the court "to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*" shall be conditioned "upon such filing of the petition" for review. It is especially significant that when Congress added the provision regarding relief *pendente lite* to Section 11(c) by way of amendment in 1959, it chose expressly to retain the jurisdictional prerequisite that a petition for review shall first have been filed. 73 Stat. 243.

The Commission makes the peculiar argument that no importance can be attached to this amendatory action "since the entire focus of the Finality Act [of which the 1959 amendment was a part] was upon the problem of effective enforcement of Commission orders." (C.B. 36, 37.) But if the issue here truly concerned the Commission's "effective enforcement role," as the Commission repeatedly asserts (*e.g.*, C.B. 11), it is difficult to comprehend why Congress should have felt itself constrained to limit its consideration of relief *pendente lite* to cases "where the Commission's order had already been entered" (C.B. 37).

The Commission's contention that "the problem of ancillary relief while the proceeding was pending before the Commission—the problem of this case—was never alluded to in the deliberations on the Finality Act" (C.B. 37) is even more absurd. Both the proposed Finality Act and the proposed legislation to grant the Commission authority to secure pre-hearing relief were referred to the same Senate Committee. Even more significantly, after *simultaneous* hearings on these two matters had been held (*Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess. (1958)), only the Finality Act was reported favorably out of the Judiciary Committee. S. Rep. No. 1808, 85th Cong., 2d Sess. (1958).[20]

During the course of these and other hearings, Congress was repeatedly reminded by the Commission that it had only recently been twice rebuffed by the courts of appeals (*Federal Trade Commission* v. *International Paper Co.*, 241 F. 2d 372 (2nd Cir. 1956), and *Federal Trade Commission* v. *Farm Journal, Inc.* (3rd Cir. 1955, unreported)) in its efforts to secure a preliminary injunction pending the completion of its administrative proceedings. *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., ser. 15, at 35 (1956); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., at 254 (1956); *Hearings before the Anti-*

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20. These were the only hearings which the Judiciary Committee held concerning the Finality Act. The bill was reported to the Senate shortly before the adjournment of the 85th Congress and failed to secure House approval. It was, therefore, re-reported to the Senate by the Judiciary Committee, *without further hearings,* shortly after the 86th Congress was convened. S. Rep. No. 83, 86th Cong., 1st Sess. 2 (1959).

trust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 2, at 103 (1957); *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., at 42-45 (1958); *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary*, 87th Cong., 1st Sess., ser. 5, at 87 (1961).

In both those cases the Commission had proceeded on exactly the same theory of Section 1651(a) jurisdiction which was rejected by the Seventh Circuit below. In the *Farm Journal* case, the Third Circuit "summarily denied" the Commission's petition without an opinion.[21] The Second Circuit, on the other hand, wrote an opinion which carefully considered each of the contentions made to this Court and rejected them out of hand. It reasoned that "the specific provisions as to who may seek injunctive relief, and in what courts, imply that the Commission itself is not authorized to do so." 241 F. 2d at 373. In fact, "[t]his implication is required by the statutory provisions" pursuant to which the courts of appeals acquire jurisdiction "only after the administrative proceeding has been concluded" (*ibid.*). "[S]ince the pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority, the 'all writs' section cannot be invoked to circumvent this limitation" (*ibid.*).

The Commission did more than bring those cases to Congress' attention, however; it candidly admitted that they were correctly decided. Chairman Gwynne, during his ap-

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21. For a discussion of the *Farm Journal* decision, see *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., at 42-43 (1958).

pearance before the Senate Subcommittee on Antitrust and Monopoly in 1958, acknowledged that the Commission's effort in the *International Paper* case "was, frankly, as you probably know, something of a forlorn hope." *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 2nd Sess. 45 (1958). Even more instructive is the following exchange between Chairman Gwynne and Senator Kefauver:

> "Senator KEFAUVER. Was that case presented to the Supreme Court by certiorari?
>
> "Mr. GWYNNE. No, we did not. We talked that over. I could not help but agree with the court, frankly. I think the remedy is to amend the law. I think we are all more or less—
>
> "Senator KEFAUVER. I think you are right about it." (*Ibid.*)

It is evident, therefore, that the failure of Congress to grant the courts of appeals the power to issue preliminary injunctions pending completion of the Commission's administrative hearings was not mere oversight, but a conscious decision to withhold such jurisdiction. Further evidence is offered by the striking contrast between the silence of Congress with respect to the jurisdiction of the courts of appeals on this question and the very explicit fashion in which Congress spelled out the jurisdiction of the district courts to issue pre-hearing relief in Clayton and Sherman Act proceedings brought by the Department of Justice. See 15 U.S.C. §§4, 9 and 25.

The decisions of this Court—including the very cases cited by the Commission — amply support the conclusion that where, as here, Congress has so plainly manifested its intention in the specific provisions of the antitrust laws

that the courts of appeals should not have jurisdiction to issue preliminary injunctions pending the completion of the Commission's hearings, the generalized provisions of the "all writs" statute cannot be used to confer that jurisdiction. Thus, in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658 (1963), this Court refused to sanction an injunction against a proposed reduction in rail rates pending the completion of hearings before the Interstate Commerce Commission. Although recognizing that neither the statute nor the legislative history afforded "unambiguous evidence of a design to extinguish whatever judicial power may have [formerly] existed . . . to suspend proposed rates" (p. 664), this Court nonetheless concluded that the specificity with which Congress, in the Interstate Commerce Act, had lodged suspension power in the Commerce Commission could only be read as having that effect.[22] In reaching this conclusion, reliance was placed on the "detailed consideration" which Congress gave to the suspension power, on the uniform holdings of the "lower federal courts" and on the consistent opinions of the "commentators on the matter". 372 U.S. at 667-8. And in the very footnote cited by the Commission (C.B. 18), this Court pointed out that the "limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction . . . has never been recognized in derogation of . . . a clear congressional purpose to oust judicial power." 372 U.S. at 671, n. 22.

Likewise, in *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411 (1965), this Court found that the statutory scheme of review specifically provided for by Congress in the Bank Holding Company Act of 1956 barred resort to the district

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22. The Commission, itself, concedes that this abrogation of the "inherent equity powers" of the courts was implicit rather than explicit. (C.B. 22, n. 5).

courts for injunctive relief pending completion of that review procedure. "That Congress has not expressly provided that the statutory review procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts." *Id.* at 422. Also in point are *Roche, Bankers Life,* and *Parr,* referred to earlier (p. 41), in which this Court confirmed that where Congress has established a specific statutory scheme for appellate review, Section 1651(a) cannot be used to override the conditions under when the jurisdiction of the courts of appeals shall attach.

Even if Congress had not pre-empted the application of the "all writs" statute by the specific delineation which it has given to the jurisdiction of the courts of appeals in the antitrust statutes, no decision by this or any other court has ever sanctioned the use of an extraordinary writ in the type of case presented here. The Commission's proposition that this Court has authorized the issuance of a Section 1651(a) writ to "maintain the *status quo* by injunction pending a review of an agency's action through the prescribed statutory channels" (C.B. 18) fails to take account of two very important conditions which have been placed on the issuance of a writ to accomplish this purpose. All of the decisions authorizing the issuance of a writ to "maintain the *status quo*" have been in instances where either (1) the court already had jurisdiction or (2) there would otherwise have been a complete ouster of its potential jurisdiction.

Scripps-Howard Radio v. *Federal Communications Commission,* 316 U.S. 4 (1942), upon which the Commission places considerable reliance (C.B. 15, 18, 35, 36), falls into

the former category. It dealt with the "conventional power of an appellate court to stay the enforcement of an [agency] order pending the determination of an appeal challenging its validity" *after the court of appeals had obtained jurisdiction of the appeal.* 316 U.S. at 16. See also *Whitney Bank* v. *New Orleans Bank,* 379 U.S. 411 (1965).

Board of Governors v. *Transamerica Corporation,* 184 F.2d 311 (1950), *cert. den.* 340 U.S. 883 (1950, on the other hand, belongs to the second category of cases—those where a complete ouster of future jurisdiction was at issue. The Commission, itself, in the application for preliminary injunction which it filed with this Court, characterized the case as "distinguishable" (p. 6).[23] *Transamerica* involved a complaint under Section 7 of the Clayton Act prior to the 1950 amendment which made it applicable to asset acquitions. At that time it was possible, even after administrative hearings had been commenced, for a respondent completely to oust the agency of its jurisdiction by transferring the assets of a corporation whose stock had been acquired to a different entity. See, *e.g., Arrow-Hart & H. Co.* v. *Federal Trade Commission,* 291 U.S. 587 (1934). The Ninth Circuit's holding that it had power under the "all writs" statute to enjoin such a threatened transfer was thus predicated on the fact that otherwise the jurisdiction of both the Board of Governors and the court of appeals would have been completely and irretrievably lost.

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23. Aside from casting considerable doubt on the validity of *Transamerica,* the commentators have also uniformly recognized that it presents no conflict with the situation presented here. Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. 391, 405 (1965); Comment, 32 N.Y.U. L. Rev. 1297, 1299, 1300 (1957).

The situation presented by *International Paper, Farm Journal* and the present case is entirely different. There is no action which the respondents can take which will result in any loss of *jurisdiction* either by the Commission or the court of appeals. The Commission will be able to proceed with its hearings regardless of whether its petition is denied and the court of appeals will similarly have an opportunity to review any Commission order which may be entered on the merits.

The Commission's attempt to create an entirely new category of cases to which this Court should stretch the "all writs" statute—that is, cases where there is neither present jurisdiction nor a threatened ouster of future jurisdiction, but solely a claim that the Commission will allegedly be unable to issue what it views as "an effective order" (C.B. 18, 19)—finds no support in any of the decisions to which the Commission makes reference. Thus, in both *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (1935), and *Looney* v. *Eastern Texas R.R. Co.*, 247 U.S. 214 (1918), the district courts had already obtained jurisdiction over the proceeding prior to the issuance of the injunction involved. And, as this Court remarked in *Looney:* "The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice." 247 U.S. at 221. *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910), on the other hand, was an instance, like *Transamerica*, involving the "rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate

jurisdiction which might otherwise be *defeated* by the unauthorized action of the court below."[24]

To fill the manifest lack of judicial, as well as statutory, authority for its application to the courts of appeals for pre-hearing relief, the Commission takes the extraordinary position that the denial of such a remedy would "subordinate the public rights vindicated by the Commission to the private interests of persons affected by administrative proceedings" since, according to the Commission, "a competitor or customer affected by the merger could *presumably* invoke the court's all-writs powers" (C.B. 21). But it is equally clear that no decision of this Court, or of any other court, would allow such a private party to invoke the jurisdiction of the court of appeals under the "all writs" statute in the instant type of case. It is true that a private individual could challenge the merger in a separate equity action brought in the district court, but that is solely because Congress has expressly granted such a remedy under Section 16 of the Clayton Act, 15 U.S.C. § 26.

In sum, the only pertinent judicial precedents, the plain language of the statutes, the overwhelming legislative history, the Commission's own public pronouncements and the uniform opinion of the commentators all dictate the conclusion that the "all writs" statute may not be used by the Commission to secure preliminary injunctive relief pending the completion of its administrative hearings.

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24. Also at issue in *McClellan* was the application of the "all writs" statute (and, more specifically mandamus) to a category of cases not pertinent here — those where the lower court either has refused to take jurisdiction or was clearly acting beyond the bounds of its authorized jurisdiction. See, *e.g.*, *Ex Parte Morgan*, 114 U.S. 174 (1885); *Ex Parte United States*, 287 U.S. 241 (1932); *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945).

IV. EVEN ASSUMING THE COMMISSION'S STANDING TO SUE, THE JUDGMENT SHOULD BE AFFIRMED SINCE THE COMMISSION, ON THE UNCONTROVERTED FACTS OF RECORD, IS NOT ENTITLED TO A PRELIMINARY INJUNCTION IN ANY EVENT.

From the outset of this litigation, it has been apparent that the competitive realities of the challenged acquisition —as opposed to the Commission's *a priori* theories—would never sustain the Commission's case for a preliminary injunction. While the Seventh Circuit did not reach the merits of the Commission's petition, it is well settled that a reviewing court may affirm on any ground which will sustain the judgment below. It is not necessary that the ground be the same as that on which the lower court based its decision. See, *e.g., Riley Co.* v. *Commissioner,* 311 U.S. 55, 59 (1940) and *Ryerson* v. *United States,* 312 U.S. 405, 408 (1940). Since, quite apart from the insubstantial character of the Commission's jurisdictional claims, the uncontroverted facts of record so clearly preclude the Commission's request for preliminary relief on the merits, and any unnecessary prolongation of this Court's stay will cause irreparable injury to the respondent Dean, we strongly urge that the writ of certiorari should be dismissed forthwith as improvidently granted.

The Commission itself conceded below that a preliminary injunction cannot issue, even assuming jurisdiction, unless there is "a likelihood of ultimate Government success on the merits" (Mem. in Support of Emergency Pet. 16). Actually, the showing is an even more demanding one where an extraordinary writ is sought under §1651(a). As this Court stated in *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 384 (1953), "the petitioner has . . . the burden of showing that its right to issuance of the writ is 'clear and indisputable.' *United States* v. *Duell,* 172 U.S. 576, 582 (1899)."

Regardless of the stringency of the test, however, the Commission cannot meet it. The only pretense for the Commission's complaint is its two-fold hypothesis that the sale of Bowman's operating assets to Dean purportedly eliminated Bowman as a viable competitor and thereby increased concentration in the Chicago milk market. Both propositions are confounded by the facts of record; facts which neither have been nor can be refuted.[25]

1. The unchallenged statements of Bowman officials and shareholders establish that Dean had nothing to do with Bowman's decision to abandon its dairy business. Bowman's operating reverses had reached such proportions prior to sale that its owners had decided to withdraw from the dairy business in any event. In the Chicago metropolitan market, where the bulk of Bowman's business was located and the Commission has elected to rest its case, Bowman's sales had declined from $56.8 million in 1960 to $46.6 million in 1964, while its operating losses had risen from $197,000 to $1,572,000.

Equally indisputable is the fact that every effort had been made by Bowman's management to effect an internal solution to the company's operating and financial plight. However, important changes in consumer buying habits had resulted in disastrous sales declines in home delivery and, despite strenuous management efforts, Bowman had been unable to build adequate supermarket volume to offset these losses. The result had been an alarming rise in operating costs. Moreover, in an industry where modern production facilities are essential to continued competitive vitality, Bowman's plants and equipment had become in-

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25. Since the facts which were established in the extensive affidavits filed below by respondents remain unchallenged, the Commission is patently in error in contending that this Court must "assume" the allegations in the Commission's petition "to be true" (C.B. 18).

creasingly obsolescent as management had found the return from its dairy operations grossly inadequate to justify substantial capital improvements.

Faced with the prospect of increasing operating losses and the absence of an internal solution to its problems, Bowman's owners concluded that they had to find a buyer for the company's dairy business. Dean was their last resort, and they decided that if that sale did not go through, they would effect a piecemeal liquidation on their own. Accordingly, contrary to the Commission's repeated assertions, the sale to Dean did not eliminate Bowman as a "substantial competitor" (C.B. 2). Quite apart from the fact that a company which is losing over a million dollars a year in the Chicago market can hardly be classified as viable, the Commission ignores that Bowman would have gone out of business under any circumstances. This is highlighted by the fact that, even if Bowman could be reestablished in the dairy business through judicial fiat, its owners would proceed with a piecemeal liquidation on their own.[26]

2. The second premise on which the Commission has rested its case is equally untenable. It mechanically as-

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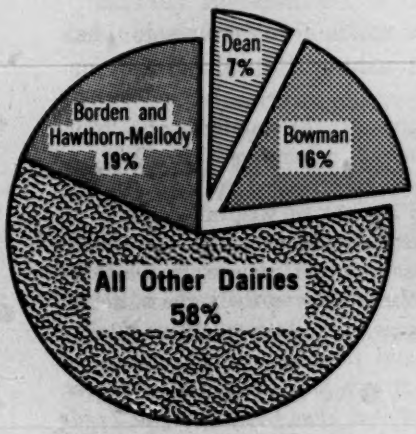
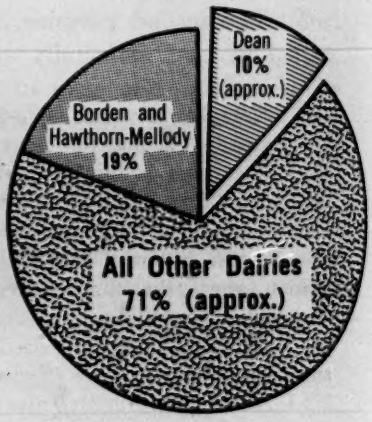
26. Whether Bowman technically met the standards of a "failing company" is not the issue here. (Compare C.B. 31-32, n. 16). The point is that its owners had decided to close out the company's dairy business and no amount of wishful thinking on the Commission's part can reconstitute the company. It should be remarked, however, that the cases do not require, as the Commission asserts, that the acquired concern be on the verge of actual bankruptcy, providing, as is the case here, its competitive vitality has been significantly impaired and there are no indications of any other anticompetitive effects. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319 (1962); *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930); *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943); *Northwest Airlines, Inc.* v. *C.A.B.*, 303 F. 2d 395 (D.C. Cir. 1962); *United States* v. *Gimbel Bros.*, 202 F. Supp. 779 (E.D. Wis. 1962); *United States* v. *Ling-Temco Electronics, Inc.*, 1961 Trade Cas. 78,621 (N.D. Tex.).

sumes that, because Bowman had 16% of the Chicago market before the sale and Dean had 7%, the acquisition must result in a combined market share of 23%, with Dean the leading seller in the market by a substantial margin (C.B. 31, n. 16). Though a sound exercise in arithmetic, the Commission's assumption overlooks that Dean, acting under the express exception to the stay which this Court has imposed, has already resold to smaller dairies in Chicago a large part of the home delivery routes which accounted for 50% of Bowman's Chicago sales volume. Also ignored is Dean's imminent loss of its largest customer, Jewel Tea, which has accounted for 75% of Dean's Chicago sales. As the following chart graphically reveals, the net effect of these developments will be to leave Dean with a market share only slightly larger than it had before the acquisition and well below that which was accounted for by Bowman alone. In fact, with the loss of the Jewel account, Dean would be an insignificant factor in the Chicago market absent the acquisition.

BEFORE[27]



AFTER[28]



27. This chart appeared (following p. 9) in the Commission's memorandum to the Seventh Circuit in support of its emergency petition.

28. This chart indicates the competitive situation which will obtain following Dean's sale of the former Bowman home delivery routes and the loss of the Jewel account.

The Commission is thus in the anomalous position of urging the condemnation of an acquisition which has substantially *decreased* concentration and appreciably strengthened smaller dairies. As the facing chart shows, the market share of "all other dairies" will increase from 58% to as much as 70% or more of the Chicago market. The acquisition will, accordingly, continue the trend toward declining concentration in the Chicago market already evident in statistics compiled by the Department of Agriculture showing that the share of the four largest dairies had dropped from 52% in 1954 to 42.3% in 1961.[29] Indeed, reference to the Department of Agriculture figures demonstrates that, *as a direct result of this transaction,* Chicago will become the least concentrated of the 59 milk marketing areas in the United States for which statistics were published. The acquisition will additionally help to counter any attrition in the number, as opposed to the market share, of smaller dairies (see C.B. 5) since Dean's disposition of the former Bowman home delivery routes will enable these smaller firms to reduce distribution costs and increase operating efficiency.

To the extent that the Bowman volume which Dean may hope to retain offsets the loss of the Jewel account and gives Dean the wherewithal to maintain its position as an effective regional competitor, the acquisition serves a purpose which the Commission itself has stressed—that of developing "a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms." *Beatrice Foods Co., supra,* p.

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29. Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS 30 (rev. ed. April, 1964). Statistics for the period since 1961 are not available.

22, 337,[30] It will also permit Dean to maintain the efficiency required to suppy low-cost dairy products to independent grocers, thereby enabling them to remain competitive with corporate and cooperative supermarket chains owning their own dairy facilities.

Clearly, the Commission not only has no case, but there is not even a remote possibility that it can make one out. This is tellingly brought home by its inability, despite a canvass of the Chicago market, to find a single dairy competitor, milk supplier or customer who would support its case before the court of appeals. In marked contrast, the respondents secured statements from knowledgeable industry witnesses who detailed the facts which led them to the conclusion that Bowman's sale of its dairy business to Dean could have "no conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally." (See Statement, pp. 6, 7, *supra.*)

Since there is no likelihood whatever that the Commission will be able to sustain its case on the merits, it would be unjust, as well as unrealistic, to force Dean to maintain assets, which had collectively been generating substantial losses prior to the sale, intact pending lengthy hearings before the Commission and the courts. If it was futile to think of maintaining Bowman as an effective competitor before the sale of its operating assets to Dean, it is even

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30. Dean is just such a firm. The Commission's frequent reference to Dean as the "12th largest dairy" overlooks the substantial "disparity in size between the eight or nine largest [dairies] and even the larger independents" noted in the *Beatrice* opinion (*id.* at p. 22,326).

more unrealistic to think that those assets could be kept in *status quo* pending an eventual ruling on the merits and then converted into "a viable independent company" (C.B. 6). This Court has already given some recognition to this fact by authorizing the sale of the former Bowman home delivery routes. Pressing problems remain, however. If the existing stay is continued, Dean will be compelled to sustain the heavy operating losses necessarily attendant upon maintaining the now half-full Chicago plant which formerly supplied those routes. Moreover, as long as the future of the former Bowman operations remains uncertain, key employees and customers may be lost at any time.[31] In addition, steps must be taken to scrap outmoded plant and equipment and other Bowman operations must be integrated with those of Dean if necessary cost-cutting is to be effected and Dean is to salvage its heavy commitment to the Bowman transaction. In short, it would unnecessarily penalize Dean to saddle it with the losses inherent in a further stay, on the very dubious assumption that the Commission will prevail on the merits and in the quixotic hope that Bowman could be reconstituted as a going concern in the dairy business.

CONCLUSION

Since the Commission's case, both on the law and the facts, is so utterly lacking in merit, we submit that the writ of certiorari should now be dismissed as improvidently

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31. Just within the past month, six of the former Bowman managerial personnel have left the company.

granted or, at the very least, that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HAMMOND E. CHAFFETZ
WILLIAM R. JENTES
DONALD G. KEMPF, JR.

Attorneys for Respondent Dean Foods Company

Of Counsel:

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
2900 Prudential Plaza
Chicago, Illinois 60601
RAndolph 6-2929

Dated: March 21, 1966

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 970

FEDERAL TRADE COMMISSION,
Petitioner,

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT BOWFUND CORPORATION

QUESTIONS PRESENTED

1. Whether the "all writs" statute, 28 U.S.C. 1651(a), authorizes the issuance of a preliminary injunction in favor of the Federal Trade Commission as an "aid" to the potential review jurisdiction of the court of appeals which may only be invoked by a respondent.

2. Whether, in any event, there is jurisdiction in the court of appeals to issue an injunction against Bowman in the absence of a showing that such a writ is necessary to preserve the possibility of an effective administrative remedy.

STATEMENT

Responsibility for enforcement of Section 7 of the Clayton Act has been shared by the Federal Trade Commission and the Department of Justice since the enactment of the statute in 1914. By means of informal arrangements, such as the Memorandum of Agreement made in June of 1948, the two branches of the Government have coordinated their enforcement activities.[1] Both the Commission and the Department are advised when any new investigation is commenced by either, and, if appropriate, "the question of which agency should proceed is submitted to a joint conference." Report of the Attorney General's National Committee to Study the Antitrust Laws, 376.

On November 2, 1965, counsel for Dean Foods Company ("Dean") advised the Commission that Dean planned to acquire the operating assets of Bowman Dairy Company ("Bowman"). (R. 150) An investigation was promptly initiated and relevant data was voluntarily supplied to the Commission. On December 13, 1965, a purchase agreement was executed providing for the sale of Bowman's operating assets to Dean for a fraction of their book value.[2] The Commission was notified the next day. (R. 152).

Before the agreement was performed, and prior to the acquisition by Dean of any of Bowman's assets, the Commission issued its administrative complaint under Section 11(b) of the Federal Trade Commission Act. The com-

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[1] When the facts warrant, the Commission and the Department of Justice may proceed simultaneously. See *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683, 694-5 (1948).

[2] Assets having a book value as of June 30, 1965, of $19,096,851 were sold for $12,438,384; eliminating receivables and prepaid expenses, fixed assets with a book value of $10,308,546 were sold for $3,750,079. (R. 159)

plaint alleged that ". . . respondents have violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act." (R. 7) The complaint contained no prayer for relief. (R. 14).

The litigation which is now before this Court was commenced on December 30, 1965, by filing in the court of appeals an Emergency Petition for a preliminary injunction and other relief. (R. 1) Before commencing this proceeding, counsel for the Commission conferred with the Department of Justice and decided that this matter would provide an appropriate vehicle to test out the jurisdictional issue which is now before this Court.[3]

The Attorney General has not instituted any proceedings in the District Court pursuant to Section 15 of the Clayton Act. The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has, however, appeared in this Court as counsel for the Commission.

On January 19, 1966, the court of appeals dismissed the Emergency Petition and dissolved the temporary restraining order which it had previously entered. It held that Congress had not authorized the Commission to apply to that court for the relief requested. (R. 153-4).

Thereafter, the acquisition was consummated, Dean acquired Bowman's operating assets, and Bowman received and invested the proceeds of sale. (R. 157).

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[3] In oral argument before the court of appeals the attorney for the Commission expressly acknowledged that the Commission "conferred with the Department of Justice before bringing this case," (R. 97) and that the case had been instituted "to test out an important jurisdictional issue." (R. 92)

ARGUMENT

I.

THERE IS NO SHOWING THAT THE RELIEF REQUESTED COULD NOT BE OBTAINED WITHOUT RESORT TO THE WRIT.

It has been repeatedly held that the availability of an adequate alternative remedy, which has not been exhausted by the applicant, forecloses the use of an extraordinary writ. Whatever may be done without the writ, may not be done with it. *Ex parte Fahey,* 332 U.S. 258, 259-260; *Bankers Life & Casualty Company* v. *Holland,* 346 U.S. 379, 383; *Ex parte Rowland,* 104 U.S. 604, 617.

Accordingly, in order to invoke the extraordinary remedy which historically has been reserved for truly exceptional cases, applicant has the burden of satisfying the Court that its interests may not be protected without resort to the writ. The Commission has not discharged that burden in this litigation.

There has been no showing that the prelitigation conferences between the Commission and the Department of Justice justified the conclusion that no relief could have been obtained from the District Court to protect the interests of the Commission. On the contrary, the inference is plain that there was a joint decision *not* to proceed in the District Court pursuant to Section 15 of the Clayton Act, but rather to cooperate in the bringing of a test case to determine whether the Commission's enforcement authority under Section 11 of the Clayton Act could be supplemented by resort to the "all writs" act.

The court of appeals wisely held that Congress had not authorized the Commission to proceed in this manner.

Since there has been no showing that the statutory remedies specifically provided by Congress for enforce-

ment of Section 7 were inadequate, but it merely appears that the Commission (and presumably the Department of Justice, as well) would like to supplement these remedies, resort to the writ is wholly unwarranted.

II.

THE EMERGENCY PETITION DID NOT SEEK RELIEF IN AID OF THE JURISDICTION OF THE COURT OF APPEALS WITHIN THE MEANING OF SECTION 1651(a).

Ostensibly this proceeding was instituted in aid of the potential jurisdiction of the court of appeals. The potential jurisdiction to which reference is made is the review procedure which only respondents may invoke in order to obtain judicial protection from arbitrary or erroneous agency action. The Commission has no right to invoke the jurisdiction of the court of appeals at any stage of the proceeding.[4] The Emergency Petition filed in the court of appeals cannot fairly be characterized as "in aid of" the court's review jurisdiction which may only be invoked by the private citizen.

The petition for a preliminary injunction does not fit either the language or the purpose of the "all writs" act.

III.

BOWMAN IS NOT A NECESSARY PARTY TO THIS PROCEEDING; ACCORDINGLY, IN NO EVENT SHOULD A WRIT ISSUE AGAINST IT.

The Commission argues that the "all writs" act may be invoked because an injunction is necessary to preserve the

[4] Prior to the 1959 amendment to the Clayton Act, the Commission was authorized to petition the court of appeals for enforcement of a divestiture order. That authority was removed by the so-called Clayton Finality Act, 73 Stat. 243.

possibility of an effective administrative remedy. (Br. 15) We believe this argument is entirely without merit. But even if it were valid, the argument has no application whatsoever to Bowman in this proceeding.

A former Solicitor General has correctly advised this Court that a company whose assets have been acquired is not a necessary party to litigation challenging the legality of the acquisition under Section 7 of the Clayton Act. See Brief for the United States in Opposition to Motion to Dismiss in *United States* v. *Continental Oil Company*, No. 834, October Term 1963. The violation, if any, is committed by the acquiring company, not the seller.

Moreover, the arguments advanced by the Commission in favor of some kind of interim relief are completely inapplicable to the selling company. Bowman has parted with control over its operating assets. Even if it be assumed that the Commission can justify an order preventing Dean from effecting changes which will produce profits instead of losses in Chicago, that objective can be obtained without directing any writ against Bowman.

Never before has the Commission obtained any relief of any kind against the company whose stock or assets were acquired in violation, or alleged violation, of Section 7. There is no reason why such novel relief should be granted in this case. Certainly Section 1651(a) should not be used as a vehicle for authorizing relief against a party who would not normally even be named as a respondent to the administrative proceeding. It is neither necessary nor appropriate to authorize the issuance of any writ against Bowman in this case.

CONCLUSION

For the foregoing reasons, together with the additional reasons set forth in the Brief in Opposition to the Petition for Certiorari submitted on behalf of Bowfund Corporation, it is respectfully submitted that the order of the court of appeals should be affirmed or, in the alternative, the order granting certiorari should be vacated as having been improvidently entered, and the petition for certiorari dismissed.

Respectfully submitted,

L. Edward Hart
John Paul Stevens
Edward I. Rothschild
Attorneys for Respondent,
Bowfund Corporation, formerly
Bowman Dairy Company

Of Counsel

Rothschild, Hart, Stevens & Barry
105 South La Salle Street
Chicago, Illinois 60603

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

1. The question presented in this case is whether a court of appeals may, at the request of the Federal Trade Commission, in appropriate case issue under the "all writs" statute (28 U.S.C. 1651(a)) a preliminary injunction to maintain the *status quo* pending the completion of a Section 7 (merger) proceeding instituted by the Commission. Respondent Dean attempts to recast the question as one of standing to sue, and argues that, because Congress has not specifically authorized the Commission to apply to the courts of appeals for such relief, the Commission may not do so (Dean Br. 1, 26–27). We believe this approach rests upon a misconception of the basis

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upon which the Commission invoked the "all writs" powers of the court of appeals.

We agree that the Commission is a creature of statute, and, in the absence of congressional authorization, does not enjoy the right of a private person to commence a suit. No one contends that the Commission may bring a criminal action in a district court or sue a businessman for damages; Congress has not authorized the Commission to commence such proceedings. But, while the Commission's authority to institute independent lawsuits is concededly dependent upon express statutory authorization, Dean's suggestion that the same principle applies to *ancillary* proceedings is wholly novel and unfounded. Congress has not expressly authorized the Commission to appear in judicial review proceedings brought by respondents pursuant to Section 11(c) of the Clayton Act (or Section 5(c) of the Federal Trade Commission Act) to set aside orders issued by the Commission; but it has never been suggested that the Commission therefore may not defend its orders in such proceedings. Similarly, it has never been suggested that, in a case where a court of appeals affirms the Commission's order and the respondent later disobeys the court's order, the Commission may not institute an ancillary contempt action in the court of appeals—though no statute authorizes the Commission to do so.

In both of the foregoing examples, and in the case at bar, the Commission is not attempting to commence an independent judicial action without having been authorized to do so; it is asking the court of appeals

to exercise the powers that Congress has given that court. Since Congress has authorized the courts of appeals to review Commission orders upon the petition of the party against which the order was issued, the Commission may—without any express statutory authorization—appear in support of the order. Since the courts of appeals are authorized to punish disobedience of their orders by contempt sanctions, the Commission may—without being expressly authorized to do so—ask the court to punish a party who has disobeyed the court's order affirming the Commission's order. And, equally, since Congress has authorized the courts of appeals under 28 U.S.C. 1651(a) to grant preliminary relief where appropriate in aid of their jurisdiction, the Commission—though Congress has not made express provision—may ask the court to exercise its power and grant such relief.

Hence, the Commission's standing to invoke the court of appeals' all-writs power is not a substantial issue here.[1] Indeed, respondents themselves nowhere express disagreement with the holding of *Board of*

[1] For the proposition that the Commission must in all circumstances have express statutory authorization to proceed, respondent Dean relies upon *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623, and *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628. We find nothing in the latter case bearing even remotely on this subject. *Eastman Kodak* decided that the Commission could not direct divestiture in a Federal Trade Commission Act proceeding, Congress not having explicitly authorized it to grant such relief. This view of the Commission's powers has since been rejected. *Pan American World Airways* v. *United States*, 371 U.S. 296, 312–313, nn. 17–18; *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129–131.

Governors v. *Transamerica Corp.*, 184 F. 2d 311 (C.A. 9), certiorari denied, 340 U.S. 883, that the Federal Reserve Board was entitled to ask the court of appeals to exercise its all-writs powers, although the Board, like the Commission, has not been expressly authorized to do so. And they disregard *Public Utilities Commission* v. *Capital Transit Co.*, 214 F. 2d 242 (C.A. D.C.), and *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775, 779 (C.A. 2)—additional authorities to the same effect.

The critical inquiry, in short, is not whether the Commission has authority to invoke the jurisdiction of the court of appeals under the all-writs act, but whether that act authorizes the court to grant a preliminary injunction pending the completion of the administrative proceedings. As developed at length in our main brief, the court has such authority.

2. Dean's contention, *supra*, that there must be an express statutory basis apart from 28 U.S.C. 1651(a) to support the Commission's request that the court of appeals issue a preliminary injunction colors its entire argument. Dean conceives the issue of this case to be whether Congress has granted the Commission authority to seek such an injunction. The true issue, however, is whether Congress has ever withdrawn from the courts of appeals their historic powers, derived not from the Clayton Act but from Section 1651(a) and its predecessors dating back to the first Judiciary Act (1 Stat. 81–82), to grant such relief in a case like the present. We submit it has not—and that Dean's heavy stress throughout its brief upon the fact that Congress has on several occasions failed

to act upon proposals to give the Commission express statutory authority to grant or obtain preliminary relief in merger cases is particularly misplaced.

United States v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, is instructive on this point. The threshold question there was whether Section 7 of the Clayton Act, as originally enacted in 1914, reached vertical stock acquisitions. Neither the Federal Trade Commission nor the Department of Justice had ever before brought a vertical case under Section 7. The Commission "repeatedly ha[d] declared its understanding that § 7, prior to its amendment in 1950, applied only to competing corporations." 353 U.S., p. 615 (dissenting opinion). And, "[b]eginning in 1927, the Federal Trade Commission included in its annual recommendations to Congress a request that § 7 be amended to remedy its inadequacies." *Id.*, p. 616. In 1950, these efforts bore fruit and Section 7 was amended, *inter alia*, "'to make it clear that the bill applies to all types of mergers and acquisitions, vertical * * * as well as horizontal.'" *Ibid.* Nevertheless, this Court held that the prior history was not of controlling significance and that the original Section 7 did reach vertical stock acquisitions.

The present is an *a fortiori* case. There was no "established administrative practice" (*ibid.*) of not invoking the courts of appeals' Section 1651(a) powers in Federal Trade Commission matters. On the contrary, twice before the present case the Commission had attempted to do so, in *Federal Trade Commission* v. *Farm Journal, Inc.*, C.A. 3 (unreported), and *Federal Trade Commission* v. *Interna-*

tional Paper Co., 241 F. 2d 372 (C.A. 2); that the Commission thereafter took the view that legislative action was necessary surely has no more significance here than in *duPont*. Moreover, here Congress cannot be thought to have "acquiesced in and recognized" (353 U.S., p. 616) the Commission's view of its lack of power, since it never acted upon the Commission's proposals to amend the law. And even had it voted them down, that would not be determinative. For as Dean concedes (Br. 31, n. 15), all the proposals were substantially different in their approach from what the Commission has attempted in this case. They included such features as compulsory pre-merger notification and administrative injunctions—features that Congress might well have found objectionable while agreeing that the Commission should be able to invoke the traditional stay powers of the courts of appeals.

3. Respondent Dean also contends that the Commission's attempt to obtain preliminary relief in this case denied it its procedural rights. There is no merit to this contention.

(*a*) Dean states that the Commission has "so committed itself to the respondents' guilt" in the preliminary-injunction proceeding that its ability to adjudicate the case on the merits has been "rendered suspect" (Br. 19). For this proposition, Dean relies on quotations excerpted from the briefs and pleadings filed by government counsel in this proceeding—*e.g.*, "it is probable" or it "appears likely" that the Dean-Bowman merger is illegal (Dean Br. 20). Examination of these excerpts in context reveals, however, that counsel for the agency have done no more than what

Congress has required the agency itself to do before it issues a complaint: determine that it has "reason to believe" that there has been a violation of law. 15 U.S.C. 21(b), 45(b). This is not prejudgment; if it were, no judge could try a case in which he had issued a preliminary injunction. And see *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703.

(*b*) Dean complains (Br. 27, n. 11) that the Commission acted improperly in going to the court of appeals without having first promulgated a rule authorizing it to do so. But the Commission, in common with most other agencies, rarely adopts rules specifying the many circumstances in which judicial proceedings may be instituted. The reasons are plain. A governmental agency may not go to court unless authorized (either expressly or, in the case of ancillary proceedings, impliedly; see pp. 2–3, *supra*) to do so by Congress. If it has such authority, promulgating a rule permitting it to exercise the authority is superfluous; if it has not, it cannot by rule create such authority. Nor can a respondent possibly be prejudiced by the absence of a rule defining the agency's power to invoke judicial process. The purpose of requiring agencies to act in conformity with published rules is to protect persons appearing before the agency from having to resort to unpublished procedures (Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a)). Nothing of that sort is involved here. Respondents are not being made to forfeit rights because of their failure to invoke an unpublished procedure of the agency—the abuse that

the provision of the Administrative Procedure Act (Section 3(a), *supra*) relied upon by Dean is designed to prevent.

(*c*) Dean contends that the Commission's action in asking the Seventh Circuit for preliminary relief has, "as a practical matter," deprived Dean of its right to a choice of forums for judicial review of any order the Commission may ultimately enter (Br. 22). This is not so, as the *Transamerica* litigation illustrates. The Federal Reserve Board had sought and obtained a preliminary injunction from the Ninth Circuit (*Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311, certiorari denied, 340 U.S. 883), but respondent appealed the Board's final order to the Third, not the Ninth, Circuit which set the Board's order aside (*Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163).

The remaining points,[2] we believe, are adequately covered in our main brief.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

MARCH 1966.

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[2] Respondent Bowfund argues (Br. 5–6) that the writ of certiorari should be dismissed as to it on the ground that it is not a necessary party in this litigation. Its joinder as a party may, however, be proper and appropriate for purposes of ensuring adequate relief. See *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 608. We consider this an issue for the lower court to decide in the first instance.

U.S. GOVERNMENT PRINTING OFFICE:1966

SUPREME COURT OF THE UNITED STATES

No. 970.—October Term, 1965.

Federal Trade Commission, Petitioner, *v.* Dean Foods Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 13, 1966.]

Mr. Justice Clark delivered the opinion of the Court.

At issue here is the power of the Court of Appeals under the All Writs Act, 28 U. S. C. § 1651 (a), to temporarily enjoin the consummation of a merger that is under attack before the Federal Trade Commission as violative of § 7 of the Clayton Act, 64 Stat. 1125, 15 U. S. C. § 18 (1964 ed.). This case arose on the application of the Commission for a temporary restraining order and a preliminary injunction against respondents Dean Foods Company and Bowman Dairy Company to maintain the *status quo* until the Commission determined the legality of their merger. The Commission alleged that it had issued a complaint against respondents under § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 15 U. S. C. § 45 (1964 ed.), and that from the facts underlying the complaint "it is probable that the Federal Trade Commission will enter an order finding a violation of these laws." The petition stated that there was a "compelling" need for preliminary relief since the "acquisition itself will split Bowman in two—Dean will acquire fixed assets, receivables and good will; Bowman will retain all cash, government and other marketable securities, and some real estate investments" for distribution to its stockholders.[1] In addition, it was alleged

[1] Since consummation of the merger all assets of Bowman, with the exception of cash and marketable securities which were exempted

that Dean planned to dispose of most of Bowman's retail milk routes, certain of its plants and equipment, and to consolidate the remaining assets. The Commission thus argued that if the merger were allowed to be completed, "Bowman as an entity will no longer exist," and that "it will be 'extremely difficult and very probably impossible' " to restore Bowman as "a viable independent" company if the merger were subsequently ruled illegal. In other words, consummation of the agreement would "prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." As grounds for issuance of an extraordinary writ, the Commission asserted that the Court of Appeals "will, in effect, be deprived of its appellate jurisdiction [over final Commission orders] and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis*—Bowman—will have vanished."

The Court of Appeals entered a temporary restraining order against respondents, as prayed. On the hearing for a preliminary injunction, however, it dissolved the temporary restraining order and dismissed the petition for the reasons that "no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and . . . we now hold that the Commission did not have authority to institute this proceeding in this court . . . ." There was no reported opinion, but in its final judgment the Court of Appeals supported its refusal to grant relief at the request of the Commission by reference to the fact that:

> "in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have

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from the purchase agreement, have been transferred to Dean. Bowman has ceased dairy operations and now acts as an investment fund, having received and invested the proceeds of the sale.

conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission."

A few hours after the Court of Appeals entered its order on January 19, 1966, the contract was closed and Dean acquired legal title to Bowman's operating assets. Upon application by the Solicitor General on behalf of the Commission, MR. JUSTICE CLARK, after consulting the other members of this Court, entered a preliminary injunction on January 24, 1966, restraining respondents from making any material changes with respect to Bowman's corporate structure or the assets purchased. This order provided that Dean might sell Bowman's retail home delivery routes upon terms and conditions acceptable to the Commission, but that any milk supplied by Dean to the purchasers of the routes must continue to be delivered under the Bowman label and from former Bowman plants. We granted certiorari on February 18, 1966, 383 U. S. 901, and expedited consideration of this case. We conclude that the Court of Appeals erred and reverse its judgment.

I.

Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true. We need not detail the facts further than to say that Dean and Bowman were substantial competitors in the sale of packaged milk in the Chicago area, one of the largest markets in the United States for packaged milk. On November 2, 1965, attorneys for Dean and Bowman met with representatives of the Commission to discuss a proposal by Dean to purchase all of Bowman's plants and equipment, the Bowman name, all customer and supplier lists together with the benefit of their relationships, and various other assets, all of which were situated

in the Chicago area. Bowman would consequently cease doing a dairy business there. It was emphasized that the inquiry was merely to ascertain the views of the staff of the Commission and not to secure a formal advisory opinion. After investigation, on December 3, 1965, the Commission's staff advised Dean's counsel that it believed the acquisition would raise serious questions under the antitrust laws, and that on the basis of existing information the staff would recommend that the Commission issue a complaint against the acquisition if consummated. After further meetings, Dean's counsel informed the Commission's staff on December 14, 1965, that the agreement had been signed. A week later the Commission issued a formal complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act.

It appears that at the time of the merger Dean was the third or fourth largest distributor of packaged milk in the Chicago area; Bowman was at least the second largest in that market; and together they enjoyed approximately 23% of the sales of packaged milk in the same area, while the four largest dairy companies had a 43% share thereof. Affidavits attached to the Commission's application alleged that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57, and that in the four months prior to the filing of the complaint four more firms had been eliminated by acquisitions. From these statistics it was concluded that the effect of Dean's acquisition of Bowman would be to substantially lessen competition. We place in the margin the Commission's summation of its complaint.[2]

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[2] The Federal Trade Commission alleged:

"(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

"(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman,

II.

The All Writs Act, 28 U. S. C. § 1651 (a), empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The exercise of this power "is in the nature of appellate jurisdiction" where directed to an inferior court, *Ex parte Crane*, 5 Pet. 190, 193 (1831) (Marshall, C. J.), and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected. Cf. *Ex parte Bradstreet*, 7 Pet. 634 (1834) (Marshall, C. J.). These holdings by Chief Justice Marshall are elaborated in a long line of cases, including *McClellan* v. *Carland*, 217 U. S. 268 (1910), where Mr. Justice Day held: "[w]e think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ . . . may issue in aid of the appellate jurisdiction which might otherwise be defeated . . . ." At 280. And in *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21

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another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

"(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

"(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;

"(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States . . . thereby tending to bring about the adverse competitive effects described [elsewhere in the complaint];

"(f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

"(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk."

(1943), Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." At 25. Likewise, decisions of this Court "have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels . . . . Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . . ." *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658, 671, n. 22 (1963). There the Court cited such authority as *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4 (1942); *West India Fruit and S. S. Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (C. A. 2d Cir. 1948); and *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir.), cert. denied, 340 U. S. 883 (1950).

Section 11 (c) of the Clayton Act, 15 U. S. C. § 21 (c), gives exclusive jurisdiction to review final orders by the Commission against illegal mergers, on application of "any person required by such order . . . to cease and desist from any such violation," to the courts of appeals "for any circuit within which such violation occurred or within which such person resides or carries on business." This grant includes the traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction. Cf. *Continental Ill. Nat'l Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). A recent case involving a similar statutory proceeding is dispositive of this issue. *Whitney National Bank* v. *New Orleans Bank*, 379 U. S. 411 (1965), raised the question whether holding companies were "lawfully entitled" to operate subsidiary

banks within Louisiana, a question we held should be determined in the first instance by the Federal Reserve Board. We further concluded that the Board should reconsider its initial approval of such a plan in light of an intervening Louisiana statute, and so gave the parties, who had sought review of the Board's order before the Court of Appeals for the Fifth Circuit, an opportunity to move that the case be remanded to the Board. It was noted that the Court of Appeals had authority "to issue such orders as will protect its jurisdiction pending final determination of the matter," at 415, and that § 1651 (a) empowered it to stay "the order of approval of the Federal Reserve Board pending final disposition of the review proceeding." At 425. In response to the argument that the stay would not be sufficient because the Comptroller of Currency nonetheless intended to issue a certificate to the bank, we stated that if "the Court of Appeals should find it necessary to take direct action to maintain the status quo and prevent the opening of the bank, it has ample power to do so" by an injunction against the applicants before the Federal Reserve Board themselves. At 426. Such action would be analogous to the relief requested here by the Commission.[3]

These decisions furnish ample precedent to support jurisdiction of the Court of Appeals to issue a preliminary injunction preventing the consummation of this agreement upon a showing that an effective remedial order, once the merger was implemented, would be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile.

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[3] Of course, the courts of appeals have traditionally framed § 1651 (a) writs in the form of compulsory injunctions aimed at private parties. *E. g., Jones* v. *President & Directors of Georgetown College*, 331 F. 2d 1000 (C. A. D. C. Cir.), cert. denied, 377 U. S. 978 (1964). See Recent Cases, 77 Harv. L. Rev. 1539, 1542 (1964).

III.

Dean and Bowman insist, however, that as a creature of statute the Commission may exercise only those functions delegated to it by Congress, and that Congress has failed to give the Commission express statutory authority to request preliminary relief under the All Writs Act.[4] But the Commission is a governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act.[5] Indeed, the opin-

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[4] For the proposition that the Commission must have express statutory authority to seek injunctions in the courts of appeals two cases are cited. The first, *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), has no relevance to our problem. And the other, *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619, 623–625 (1927), even though apposite, has been repudiated. It held that in fashioning a final decree the Commission "exercises only the administrative functions delegated to it by the Act," and, therefore, could not order divestiture of laboratories acquired through a stock purchase. This view was rejected in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296, 312–313, nn. 17–18 (1963), the Court holding that "the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority," citing *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 (1963).

[5] Such a holding would especially interfere with the functions Congress has given the Commission in the merger field. As THE CHIEF JUSTICE stated in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), the Congress "sought to assure the Federal Trade Commission and the courts the power to brake this force [business concentration] at its outset and before it gathered momentum." At 317–318. But without standing to secure injunctive relief, and

ions in *Arrow Transp. Co.* and *Whitney National Bank* necessarily recognized the standing of administrative agencies to seek such preliminary relief to ensure effective judicial review. Both decisions referred to *Board of Governors* v. *Transamerica Corp., supra,* where the Court of Appeals stayed a merger on application by the Federal Reserve Board. See also *Public Utilities Comm'n* v. *Capital Transit Co.*, 214 F. 2d 242 (C. A. D. C. Cir. 1954), and *West India Fruit & S. S. Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775, 779 (C. A. 2d Cir. 1948). There is no explicit statutory authority for the Commission to appear in judicial review proceedings, but no one has contended it cannot appear in the courts of appeals to defend its orders. Nor has it ever been asserted that the Commission could not bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has

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thereby safeguard its ability to order an effective divestiture of acquired properties, the Commission's efforts would be frustrated. As MR. JUSTICE DOUGLAS said in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186 (1944):

"The acquisition of a competing theatre terminates at once its competition . . . . And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock."

Here the plan of merger itself contemplates the sale of the acquired home delivery milk routes and certain milk plants. In addition, Bowman has retained its cash and securities, with the intention ultimately to distribute them to its stockholders. If consummation of the merger is not restrained, the restoration of Bowman as an effective and viable competitor will obviously be impossible by the time a final order is entered. This is not unusual. Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture. *E. g., Ekco Products Co.*, Trade Reg. Rep. ¶16,879 (1964) (1963–1965 Transfer Binder), aff'd, 347 F. 2d 745 (C. A. 7th Cir. 1965); *Foremost Dairies, Inc.*, 60 F. T. C. 944, order modified per stipulation (C. A. 5th Cir. 1955) (Docket No. 18,815).

no statutory authority in this respect. Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities.

It must be remembered that the courts of appeals derive their power to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789. Congress has never restricted the power which the courts of appeals may exercise under that Act. Nor has it withdrawn from the Commission its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction.[6] In the absence of explicit direction from Congress we have no basis to say that an agency charged with protecting the public interest cannot request that a court of appeals, having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act to issue such temporary injunctions as may be necessary to protect its own jurisdiction.

Respondents point—as did the Court of Appeals—to the fact that the Commission sought authority from both the Eighty-fourth and Eighty-ninth Congresses to grant preliminary injunctions itself or to proceed in the district court as the Department of Justice can under the Clayton Act.[7] Both former Chairman Gwynne and Chairman Dixon appeared in support of the measures,[8]

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[6] Cf. *Public Utilities Comm'n* v. *Capital Transit Co.*, 214 F. 2d 242, 245 (1954), where the Court of Appeals for the District of Columbia gave as one of its reasons for granting an injunction the fact that "the moving party in the litigation was the Public Utilities Commission of the District of Columbia, a governmental agency clothed by Congress with special responsibility in the matters involved."

[7] *E. g.*, H. R. 9424 and S. 3341 and 3424, 84th Cong., 2d Sess. (1956); H. R. 49 and 1574, 89th Cong., 1st Sess. (1965).

[8] Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 2d Sess., 35 (1956); 85th Cong., 2d Sess., 42–45 (1958) (testimony of Chairman Gwynne). Hearings before the Antitrust Subcommittee of

and referred to *Federal Trade Comm'n* v. *International Paper Co.*, 241 F. 2d 372 (C. A. 2d Cir. 1956), which held the Commission had no standing to seek preliminary injunctions from the courts of appeals.[9] In addition, several Congressmen made statements regarding the need for statutory amendment.[10] However, no proposal was put before the Congress relating to the authority of the Commission to secure preliminary relief before the courts of appeals in accordance with § 1651 (a). The proposals concerned only the power of the Commission itself to issue preliminary relief or to proceed in the district courts for that purpose.

Congress neither enacted nor rejected these proposals; it simply did not act on them.[11] Even if it had, the legislation as proposed would have had no effect whatever on the power that Congress granted the courts by the All Writs Act. We cannot infer from the fact that Congress took no action at all on the request of the Com-

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the House Committee on the Judiciary, 87th Cong., 1st Sess., 85–86 (1961) (testimony of Chairman Dixon).

[9] They also directed attention to the denial of injunctive relief in *Federal Trade Comm'n* v. *Farm Journal, Inc.* (C. A. 3d Cir. 1955) (unreported). Both men failed to mention the contrary decision in *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir.), cert. denied, 340 U. S. 883 (1950). In *Ekco Products Co.*, Trade Reg. Rep. ¶16,879 (1964) (1963–1965 Transfer Binder), aff'd, 347 F. 2d 745 (C. A. 7th Cir. 1965), Commissioner Elman stated that the question of the Commission's ability to obtain a preliminary injunction under the All Writs Act "has not been authoritatively answered." At 21,905, n. 10.

[10] Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., 156–157 (1958) (testimony of Congressman Celler). Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 42–45 (1961) (statement of Congressman Patman).

[11] *Cf. Helvering* v. *Hallock*, 309 U. S. 106, 120 (1940), where it was said that to give weight to the nonaction of Congress was to "venture into speculative unrealities."

mission to grant it or a district court power to enjoin a merger that Congress thereby expressed an intent to circumscribe traditional judicial remedies. Cf. *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4, 11 (1942). The decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), is apposite. Following an adverse decision in *Eisler* v. *Clark*, 77 F. Supp. 610 (D. D. C. 1948), the Department of Justice asked Congress for legislation exempting the Immigration Service from the Administrative Procedure Act. 60 Stat. 237, 5 U. S. C. § 1001 (1964 ed.). As was the case here, the appropriate committees of both Houses reported the proposal favorably but Congress adjourned without taking any action. The Department nonetheless insisted in *Wong Yang Sung* that hearings in deportation cases did not have to conform to the requirements of the Administrative Procedure Act. In his discussion of legislative history, Mr. Justice Jackson wrote for a unanimous Court that "we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." At p. 47. This Court has consistently refused to construe such requests by government agencies and the resulting nonaction of the Congress as affirmative evidence of no authority.[12] Thus, in *United States* v. *du Pont & Co.*, 353 U. S. 586 (1957), JUSTICE BRENNAN held:

> "During the 35 years before this action was brought [in 1949], the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to verti-

[12] Cf. *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 348–349 (1963).

cal acquisitions. See F. T. C., Report on Corporate Mergers and Acquisitions, 168 (1955), H. R. Doc. No. 169, 84th Cong., 1st Sess. Also, the House Committee considering the 1950 revision of § 7 stated that '. . . It has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . .' H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 Amendment was purposed '. . . to *make it clear* that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . . .' (Emphasis added.)

"This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by Congress. . . . The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the [1914] Act." At p. 590.

Despite the representations of the Commission that the 1914 Act did not apply to vertical mergers, its sponsorship of legislation to so enlarge its coverage, and the passage of the 1950 Act by the Congress for this purpose, this Court nonetheless held that the 1914 Act included vertical mergers from its very inception, and thus required du Pont to divest its interest in General Motors stock, which had been acquired in 1915.

It is therefore clear that the "proceedings" in the Congress with reference to the authority of the Commission itself to issue or apply to the district courts for the issuance of preliminary injunctions in merger cases have no relevance whatever to the question before us. In short, Congress gave no attention to the exercise of judicial power by the courts of appeals under the All Writs

Act, leaving that power intact and the standing of the Commission to invoke it undiminished. We thus hold that the Commission has standing to seek preliminary relief from the Court of Appeals in the circumstances alleged. As stated earlier, we must take the allegations of the Commission as true, and so do not pass upon whether preliminary injunction should be issued. That is for the Court of Appeals to decide on remand, as it would decide any application to it for relief under the All Writs Act.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 970.—October Term, 1965.

Federal Trade Commission, Petitioner, *v.* Dean Foods Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 13, 1966.]

Mr. Justice Fortas, with whom Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White join, dissenting.

The Court today decides that the Courts of Appeals must entertain original applications by the Federal Trade Commission for the issuance of preliminary injunctions to restrain mergers alleged to violate § 7 of the Clayton Act, 15 U. S. C. § 18, pending proceedings before the Commission to determine whether such mergers violate that section.

In so deciding, the Court determines that the Commission—an administrative agency with defined and circumscribed powers—is authorized to seek such relief in the courts of appeals; and that the courts of appeals, under the All Writs Act, 28 U. S. C. § 1651 (a), have power to entertain the Commission's petition and to grant the injunctive relief.

This decision cannot be supported. Not a single one of the prior decisions of this Court cited as authority sustains it, either specifically or directly, or by principle or analogy. No statute of the Congress can be appropriately summoned to the Court's aid. The plain, unmistakable intent of the Congress in defining the Commission's powers and the jurisdiction of the courts of appeals is that no such threshold injunctive power is available at the Commission's behest. The Act plainly and explicitly vests the governmental power to restrain and enjoin violations of the Act in the district courts, and not the court of appeals; and it plainly and explicitly

empowers the United States attorneys "under the direction of the Attorney General"—and not the Federal Trade Commission—to institute such proceedings. 15 U. S. C. § 25.

Since 1956, the Federal Trade Commission has persistently requested the Congress to enact legislation giving the Commission itself the power to enjoin, or alternatively, to seek a district court order to enjoin mergers pending the outcome of the Commission's proceedings. Congress has just as persistently refused to do so.

Beginning in 1956, at least 37 bills have been introduced in the Congress, directed to providing the Commission with a threshold, temporary remedy. None has been enacted, despite the unequivocal statements of the three chairmen of the Commission who served during those years that the agency presently has no power to seek relief ancillary to its administrative proceedings. This Court now bestows what the Congress has withheld.

The statements in the Court's opinion indicating that its result is necessary unless we are to "stultify congressional purpose" fly in the teeth of the record, plainly written and repeatedly reiterated. Congress is keenly interested in enforcement of § 7. But it has demonstrated over and over again that it has no interest in arming the Commission with the power today conferred upon it. It created and equipped the Commission with administrative and quasi-judicial powers to serve a function quite distinct from that of a prosecutor or litigant. It has repeatedly declined the urgent request to revise the Commission's role and function. Indeed, Congress has refused to empower the Commission to ask for this relief in an otherwise suitable forum—the district courts. But the Court today gives this agency, which Congress obviously regards as unsuitable for the purpose, power to resort to an unsuitable forum—the courts of appeals—for the same purpose.

The Commission, the Executive Branch of the Government, the Congress and all courts which have passed upon the point have until today proceeded on the expressed premise that the Federal Trade Commission has no authority to seek such relief.[1] I have not found a single commentator in this much-written field of law who has suggested that the Commission has such authority, and none is cited in the Court's opinion or in the briefs of the parties.[2]

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[1] See *Federal Trade Comm'n* v. *International Paper Co.*, 241 F. 2d 372 (C. A. 2d Cir. 1956); *Federal Trade Comm'n* v. *Farm Journal, Inc.* (C. A. 3d Cir. 1955); *In The Matter of A. G. Spalding & Bros., Inc.* (F. T. C. Docket No. 6478), the Commission failed to obtain preliminary relief in the First Circuit, but did get respondent's commitment not to alter the *status quo* save on 30 days' notice. See *A. G. Spalding & Bros., Inc.* v. *F. T. C.*, 301 F. 2d 585 (C. A. 3d Cir. 1962).

The sole instance where injunctive relief was obtained is *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (C. A. 9th Cir. 1950), cert. denied, 340 U. S. 883. In *Transamerica* the threatened action would have defeated the Board's jurisdiction entirely. The Board (whose role in § 7 enforcement is like the FTC's) argued both in the Court of Appeals and in opposition to the petition for certiorari, that if Transamerica were not restrained from disposing of stock holdings the legality of whose acquisition was in issue in the administrative proceedings, the effect under the pre-1950 version of § 7, as construed by this Court in *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587, would be to "oust the Board of its jurisdiction under Section 11 of the Clayton Act . . . [and to] defeat the exclusive jurisdiction of the Court of Appeals to enforce or affirm such order as the Board might make . . . ." Government's Brief in Opposition in *Transamerica Corp.* v. *Board of Governors* (Nos. 322 and 323, October Term, 1950), at pp. 5, 8–9, 15. See also *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 339, n. 17, where *Transamerica* appears to have been distinguished from *International Paper, supra*, precisely on the ground that the writ there was necessary to protect the "jurisdiction" both of the agency and of the Court of Appeals—a conventional use of the All Writs Act.

[2] On the contrary, the common view is that such authority is entirely lacking. See, *e. g.*, Kayeen and Turner, Antitrust Policy

I can only assume that the majority is motivated by a desire to lend all assistance to the Federal Trade Commission in its administration of § 7. However commendable this motivation may be in general, it is here entirely misdirected. Indulgence in this generous spirit unjustifiably burdens the courts of appeals with a fact-finding duty which they are unable to perform; disrupts the statutory division of functions between the Commission and the Department of Justice; and deprives parties of the opportunity for fair and careful consideration of their proposals which is promised by our law, by the decisions of this Court and the economic needs of the Nation.

The Clayton Act contains specific and comprehensive enforcement provisions. There is no vacuum to be filled by ingenuity. There is no room for improvisation. The Act is fully armed with a triple arsenal. Enforcement powers with respect to mergers under § 7 are vested in the Department of Justice, the Federal Trade Commission and private persons who claim injury as a result of the merger. Both the Department of Justice and private litigants are authorized to seek injunctive relief in the district courts. But the role and function of the Federal Trade Commission is differently conceived.

The powers of the Commission and the manner of their exercise and of review and enforcement of Commission orders are set out in meticulous detail. Whenever the Commission "shall have reason to believe that any person is violating or has violated" § 7, it shall issue a complaint. The complaint is to be served upon "such person and the Attorney General." The Attorney General may intervene in the Commission's proceeding. He may institute actions in the district court for injunctive relief.

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258 (1959); Duke, Scope of Relief Under Section 7 of the Clayton Act, 63 Col. L. Rev. 1192, 1206, n. 85 (1963); Note, 79 Harv. L. Rev. 391, 404 (1965); Note, 40 N. Y. U. L. Rev. 771 (1965); Comment, 32 N. Y. U. L. Rev. 1297 (1957).

The Commission is to hold a hearing; testimony is to be taken; the Commission is to "make a report in writing"; and it is empowered to issue an order to cease and desist and to compel the respondent *to "divest itself of the stock . . . or assets . . . held . . . contrary to the provisions of* [§ 7]." 15 U. S. C. § 21 (b). The respondent may obtain review of the order in an appropriate court of appeals in the manner and with the consequences meticulously defined in the Act, as hereinafter discussed.

There is no question—I submit that there can be no question—that Congress from the outset intended that the Federal Trade Commission should not have other or different or supplementary or additional power to enforce § 7.[3] The Commission was created in the same

[3] The Court's opinion asserts, in alleged demonstration of the "ancillary powers" which have been inferred on the Commission's behalf, that it may bring "contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect." The Court errs. The Commission's powers in this respect are not "implied." The machinery by which the Commission procures compliance wtih its orders is, and always has been, spelled out by statute. Until 1959, one could with impunity violate an FTC Clayton Act order. Such an order was not final until the respondent sought judicial review and a Court of Appeals granted enforcement. Disobedience thereafter was a contempt of court. In the event the respondent did not seek review, the Commission was required to ascertain that he was violating its order and then proceed, *pursuant to express statutory provision* (15 U. S. C. § 21), to seek enforcement in the Courts of Appeals. See 28 U. S. C. § 2112, authorizing the Courts of Appeals to promulgate rules for enforcement proceedings; and see, *e. g.*, 1st Cir. R. 16. Cf. Fed. Rules Civ. Proc. No. 70. A violation thereafter constituted contempt of court. The courts declined to infer any more convenient substitute for this three-step process. See *Federal Trade Comm'n* v. *Henry Broch & Co.*, 368 U. S. 360, 365; *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 477–479.

The statute was amended in 1959. An FTC order under the Clayton Act is now final upon expiration of the time allowed respondent to seek judicial review. If he does not appeal the order

year that the Clayton Act was adopted. It was supposed to be an expert, administrative agency. It was not intended to be a litigation arm of the United States except as its own final orders might be involved.[4] It was not intended to have power to seek or deliver the quick result, even in emergencies. This power, so far as the Government is concerned, was explicitly, carefully confined to the district courts on application of the United States attorney "under the direction of the Attorney General."

Section 15 of the Clayton Act, 15 U. S. C. § 25, expressly authorizes the Department of Justice to proceed in the district courts of the United States to obtain preliminary relief against allegedly unlawful mergers. Section 16 makes the same remedy available on application of private litigants. 15 U. S. C. § 26. Nowhere is such power given to the Commission. It would be incredible to suggest that this omission was an oversight—or even an error. It was by design—and, I suggest, by rational design.

The Commission was not intended to—it has no power to—it should not—make a judgment on the merits prior to notice and hearing. To sanction its doing so is to strike a devastating blow at the fundamental theory upon which the exercise of both prosecutorial and adjudicatory functions by an administrative agency is based. Cf.

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and violates its terms after it becomes final, the Government may proceed, *pursuant to statute* (15 U. S. C. §§ 21 (g) and (*l*)), to seek civil penalties of up to $5,000 per violation.

In short, and contrary to the suggestion in the Court's opinion, the Commission's power to enforce compliance with its orders is and has been wholly statutory. Nothing has been left to implication.

[4] See 51 Cong. Rec. 1963, 13047, 8977 (1914); Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666 (1926).

§ 5 (c) of the Administrative Procedures Act of 1946, 5 U. S. C. § 1004 (c).

The Commission, prior to taking evidence and writing a report, is supposed to make only a very limited judgment: that there is "reason to believe" the law is being violated. But to obtain a preliminary injunction, it must—without hearing the other side, and ordinarily merely on its staff's recommendation, necessarily based upon a quick exposure of the facts—file affidavits or produce evidence with the calculated purpose of demonstrating to the court of appeals that consummation of the merger will have such adverse effects that it must be halted *in limine*. In fact, and in all realism, it must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger will tend substantially to lessen competition or create danger of monopoly, that it is harmful to the economy, immediately threatening in its consequences, and that it is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertion and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission is supposed objectively to consider the same issues on the basis solely of the record.

The clear design of the statute is that the authority to decide, on behalf of the Government, to seek the powerful remedy of preliminary injunction, and the power to do so, is vested in the Attorney General. That is his business—his type of function. It is deliberately withheld from the Commission. That is not its business. The Commission is supposed to be an expert agency, acting deliberately, bringing to bear upon the complex economic problems of a merger, that judgment and experience which can emerge only from careful factual inquiry, the taking of evidence and the formulation of a report. The Federal Trade Commission was not in-

tended to be a gun,[5] a carbon copy of the Department of Justice.[6]

It has steadily been acknowledged by spokesmen for the Commission, by leading members of the Congress, and by officials of the Executive Branch that the FTC has no basis in statute to seek the relief the Court today makes available to it. In the Appendix to this opinion, I refer to these acknowledgments and I describe the unsuccessful, oft-repeated efforts of the Commission to obtain legislation to give it the power it has now successfully obtained from this Court.[7]

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[5] Where Congress has determined that it is appropriate for the Commission to seek threshold relief in order to protect the public, it has expressly so provided—directing that the Commission proceed in an appropriate tribunal, the United States District Courts. See § 13 (a) of the Federal Trade Commission Act (Wheeler-Lea Amendments), 15 U. S. C. § 53 (a); § 302 of the Food, Drug, and Cosmetic Act, 21 U. S. C. § 333; § 7 (b) of the Wool Products Labeling Act, 15 U. S. C. § 68e (b); § 9b of the Fur Products Labeling Act, 15 U. S. C. § 69 (g) (b); § 6a of the Flammable Fabrics Act, 15 U. S. C. § 1195 (a); and § 8 of the Textile Fiber Products Identification Act, 15 U. S. C. § 70f.

[6] See Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387–388 (1964).

[7] The Court declares that these materials are irrelevant because Congress had before it proposals to authorize the Commission itself to issue restraining orders *pendente lite* or to apply to the district courts for such relief. But the fact that no one proposed and Congress did not consider providing that the Commission might have recourse to the courts of appeals merely emphasizes the extreme and extraordinary nature of the device which the Court today creates. The plain fact, and the short answer, is that Congress refused to authorize preliminary restraints at the command of the Commission. Its refusal to authorize such relief in the district courts demonstrates, *a fortiorari*, that it would not create such a remedy in the courts of appeals.

The Court also suggests that it would be improper to draw conclusions from congressional inaction. The inference that I draw from congressional refusal to make preliminary injunctive relief available to the FTC is that such inaction confirms (a) that Congress

In short, the Commission has no power to decide that a proposed merger should be enjoined *pendente lite;* it has no authority to seek such relief, temporary or permanent in any court—trial or appellate; and Congress has repeatedly turned a deaf ear to its requests for such power.

It should not be given such jurisdiction by fiat of this Court. It should do what Congress intended it to do—upon determining that it has "reasonable cause to believe" that § 7 is being or has been violated, it should issue a complaint, hold a hearing, make a report, and issue an order. If exigencies require, it may refer the matter to the Attorney General for consideration as to whether the Department of Justice should seek a preliminary injunction in the appropriate district court.[8] If

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in devising the statutory plan did not intend the Commission to have such power, and (b) that the relief sought is not consonant with the congressional plan for administering § 7. In fact, this is not a situation where the agency went to Congress in the belief that its authority was unclear, or to remove doubts concerning it. Compare *United States* v. *Speers*, 382 U. S. 266, 274–275; *United States* v. *du Pont & Co.*, 353 U. S. 586, 590; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47–48. Here, there is no doubt that the agency sought *additional* powers, not clarification. It admitted—it asserted—that it had no present authority to obtain preliminary relief (see Appendix to this opinion). It sought what it confessedly did not have. It sought this not once, but repeatedly, over a period of 10 years. Congress did not grant its request. Nor should we. See *Fribourg Navig. Co.* v. *Commissioner*, 383 U. S. 272, 279–286; *Blau* v. *Lehman*, 368 U. S. 403, 412–413.

[8] Spokesmen for the FTC have frequently acknowledged the availability of such a course. See, *e. g.*, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 101–102 (testimony of Paul Rand Dixon) (1961); Kintner, The Federal Trade Commission in 1960—Apologia Pro Vita Nostra, 1961 Antitrust Law Symposium 21, 41.

The Commission also has on occasion successfully employed the technique of obtaining an agreement of the parties to segregate assets so as to facilitate divestiture should it be decreed. See, *e. g.*,

the merger is consummated, the Commission should, if warranted, exercise the enormous power that the statute expressly gives it: to require the offender to "divest itself of the stock, or other share capital, or assets, held . . . contrary to the provisions" of § 7. It is a cliche of doubtful truth in this situation that an omelette cannot be unscrambled. This Court, as well as the Commission, has entered such orders of divestiture after—and sometimes long after—the merger has been consummated. See, *e. g.*, *United States* v. *Von's Grocery Co.*, — U. S. — (decree six years after merger); *United States* v. *El Paso Gas Co.*, 376 U. S. 651 (decree seven years after merger). Unscrambling may be difficult; but Congress may well have been justified in the view that the extra effort is warranted in the interests of securing what it hoped would be careful administrative consideration of the merits of proposed mergers. Not every merger deserves sudden death. In many situations, mergers serve no purpose except the pursuit of bigness. But some are distinctly beneficial to the achievement of a competitive economy.[9] I respectfully submit that this Court should not encourage the machinegun approach to the vastly important and difficult merger problem. It should indulge the Congress in its desire that at least the Federal Trade Commission should be required to move with caution and deliberation. A "preliminary" injunction, in effect during the years required to complete the Commission's proceedings, often—probably usually—means that

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A. G. Spalding & Bros., Inc. v. *F. T. C.*, 301 F. 2d 585, 588 (C. A. 3d Cir. 1962).

[9] For example, in some situations the merger of relatively small competitors may result in creation of an enterprise capable of meaningful competition with a company otherwise in unchallenged domination of an industry. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 319, and legislative materials therein cited.

the plans to merge will be abandoned.[10] We should not beguile ourselves by ignoring this point. "Preliminary" here usually means final. And I respectfully suggest that it is permissible for Congress to insist that the merits of mergers should be carefully considered.

II.

I come now to the second phase of the Court's opinion. Having satisfied itself that the Commission may apply to the courts for preliminary injunctions, the Court turns to the question of the jurisdiction of the courts to entertain such applications. It finds jurisdiction in the courts of appeals by reason of the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

This is, in my opinion, a totally unjustified employment of the All Writs Act. That Act is an implementing statute, designed to authorize the courts to supply deficiencies in procedure so as to enable them effectively to exercise their jurisdiction. The Act is abused where, as here, it is contorted to confer jurisdiction where Congress has plainly withheld it. The reason why this Court may not command or vindicate the exercise of jurisdiction by the courts of appeals to issue, as an original matter, injunctions against claimed violations of § 7 are overwhelming. In summary, they are:

1. The courts of appeals have no jurisdiction with respect to § 7 except to review an order entered by the Commission after statutory proceedings. Until such an order is entered, they have no jurisdiction, either existing or potential, which an injunctive order may implement.

[10] See Kaysen and Turner, Antitrust Policy 248 (1959); Note, 40 N. Y. U. L. Rev. 771, 772, n. 7 (1965), and cases cited therein.

2. By express statutory provision, even after a Commission order has been entered, the courts of appeals have no jurisdiction as to the merits of the merger, on application of the Commission. Only a party affected by the Commission's order may file a petition to review. If one does not, the Commission's sole remedy is to seek penalties in the district courts under 15 U. S. C. § 21 (*l*).[11]

3. The statute contains its own "all writs" provision which is clearly and specifically limited to instances in which the court of appeals' jurisdiction has already attached upon petition to review a Commission order filed by a person who is the target of that order.

4. There is not a single precedent of this Court which supports the Court's conclusion. None of the cases of this Court cited in the majority opinion lends it the slightest support.

5. Exclusive jurisdiction to issue preliminary injunctions against mergers is vested in the district courts, upon application of the Department of Justice or a private person. The courts of appeals have no jurisdiction to enter such orders.

6. The courts of appeals are not equipped to make the original, complex factual determinations necessary to decide whether a prospective merger should be enjoined. To burden them with this task is to distort their function; to saddle them with a function which they cannot perform; to load upon them with the necessity of twice passing upon a challenged merger; and to deprive the parties of an opportunity for a hearing in a forum equipped to make original factual determinations.

The jurisdiction and powers of the courts of appeals with respect to Commission proceedings under § 7 are defined by the statute in specific and exhaustive detail.

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[11] See note 3, *supra*.

A petition to review may be filed with an appropriate court of appeals by "any person required by [an] order of the commission" to cease or desist or to divest itself of stock or assets. 15 U. S. C. § 21 (c). The Court's jurisdiction attaches upon the filing of the petition, *ibid.*, and becomes exclusive upon filing of the record with it." 15 U. S. C. § 21 (d). The Commission's findings as to the facts are conclusive if supported by substantial evidence. 15 U. S. C. § 21 (c). If additional evidence is to be taken, the Court must remand to the Commission; it cannot itself take evidence. *Ibid.* The Court may affirm, modify or set aside the Commission's order. It may enforce the Commission's order as affirmed and may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." *Ibid.*

The Court does not—it could not—contend that these provisions lend the slightest support to its conclusion. They clearly, emphatically, and pointedly contradict it. The courts of appeals have jurisdiction when and if, and only if and when, a Commission order has been entered and a petition for review is filed—not by the Commission but by the aggrieved person.[12] When a petition for re-

[12] Indeed, there is no certainty that the particular court of appeals selected by the FTC on its application for preliminary relief will ever undertake to review an ultimate cease-and-desist order. Section 11 (c) of the Clayton Act, 15 U. S. C. § 21 (c), provides that a person against whom such an order is entered may appeal "in the court of appeals . . . for any circuit within which such violation occurred or within which such person resides or carries on business." In the present case, review of any final FTC order might lie not in the Court of Appeals for the Seventh Circuit, but in the Sixth or Eighth Circuit where both Dean and Bowman carry on business. See *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C. A. 3d Cir. 1953), cert. denied, 346 U. S. 901, setting aside an injunction issued by the Ninth Circuit; *A. G. Spalding & Bros., Inc.* v. *Federal Trade Comm'n*, 301 F. 2d 585 (C. A. 3d Cir. 1962),

view is filed, the court of appeals has "plenary" jurisdiction, implemented by the self-contained all-writs provision; and when the record is filed, that jurisdiction is exclusive. Prior to the entry of the Commission's order, the courts of appeals simply have no jurisdiction, existing or potential. The general All Writs Act is limited to writs "in aid of their respective jurisdictions." It is not a charter to be used at the behest of an administrative agency in order to supply it with a weapon which Congress has withheld. This is clear enough; and nothing in our prior decisions expands the meaning of the All Writs Act to cover the present situation.

The Court cites a number of cases to prove that an appeal need not have been perfected to call into play the power of the appellate courts to issue protective writs. This is clear and obvious as applied in those cases. Each of them involved issuance of a writ to prevent action or inaction by a trial court which would otherwise mean that the case would not be adjudicated on its merits and therefore could not be reviewed on appeal. The typical case involves the issuance of mandamus to the trial court to compel it to proceed with the adjudication of a pending case. In this category are the first three cases cited on the point by the Court.[13]

The fourth case cited by the Court clearly demonstrates the correct principle and the error of the Court's decision in the present case. In *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21 (1943), the respondent was

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enforcing an FTC order as to which an injunction unsuccessfully had been sought in the First Circuit seven years earlier.

[13] *Ex parte Crane*, 5 Pet. 190, 193; *Ex parte Bradstreet*, 7 Pet. 634; *McClellan* v. *Carland*, 217 U. S. 268. From its excerpt from *McClellan*, the Court omits the italicized portion: "[A] writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated *by the unauthorized action of the court below*."

indicted for price fixing. It filed a plea in abatement based upon an alleged fault in the authorization of the indictment. The District Court dismissed the plea. On application for a writ of mandamus, the Court of Appeals reversed, but this Court reversed the Court of Appeals because whatever might be the merits of the District Court's dismissal of the plea in abatement, that dismissal did not defeat appellate jurisdiction. The District Court would proceed to adjudicate the merits of the case, and appellate jurisdiction would thereafter be available. The Court (per Chief Justice Stone) stated that "while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." *Id.*, at 26. The Court said that "The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Ibid.* Since the District Court was proceeding to adjudicate the case, and any error it might have committed would come to the appellate courts upon appeal, the Court held that the Court of Appeals erred in issuing the writ.

These decisions, therefore, are far from supporting the Court's decision in the present case. They are to the precise contrary. They demonstrate the obvious meaning of the language of the All Writs Act: that it is to be employed "in aid of" appellate jurisdiction—not to vest general restraining power in the courts of appeals, but to authorize them to overcome action or inaction which would prevent the case from proceeding to judgment and then to appellate review in the ordinary course. Nothing of the sort—nothing resembling it—appears in the present situation. The Commission may proceed with its hearings, as provided by statute. As provided by

statute, it may enter an order requiring respondent to divest itself of the acquired assets. It may even—although I express no opinion on the issue—require action by the respondent, if it has irretrievably disposed of some or all of the assets, to take additional action to make available assets, customers, etc., for purchase by others so as to re-create a competitor, perhaps even if such action involves disposition of nonacquired assets.[14] And the appropriate court of appeals and this Court will have full, complete appellate jurisdiction with respect to its order.

The Court cites four of its prior decisions involving the availability of the All Writs Act in connection with administrative proceedings. These provide no assistance to it. First, it refers to *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658. This case is precisely *contra* to the Court's conclusion here. After a "brief and informal" hearing which led to a tentative conclusion the increase was "unreasonable," the ICC suspended respondent's proposed rate increase and instituted a formal proceeding to adjudicate the reasonableness of the increase. The proceeding was still in progress when the maximum time provided by statute for suspension of the increase expired. Petitioner sued in the District Court, seeking an injunction pending the Commission's decision. This Court sustained denial of the injunction. It held that the Commission's jurisdiction was exclusive of any power in the courts to grant the relief, and that Congress' action in vesting power in the Commission left no latitude for court action even though it might mean that the small shipper could not continue in business under the higher rate. MR. JUSTICE BRENNAN, speaking for

[14] Compare *United States* v. *Aluminum Co. of America*, 247 F. Supp. 308, 316 (D. C. E. D. Mo. 1965), aff'd, 382 U. S. 12, with *Reynolds Metals Co.* v. *United States*, 309 F. 2d 223 (C. A. D. C. Cir. 1962). See Duke, *op. cit. supra*, note 2.

the Court, observed, in words that are applicable here, that if the courts were to entertain petitioners' application for an injunction against the effectiveness of the rates pending Commission decision, they would in effect be prejudging the case and prejudicing administrative action. "[S]uch consideration," he said, "would create the hazard of forbidden judicial intrusion into the administrative domain." *Id.*, at 670. Correspondingly, I suggest that it is unlikely in the real world that if the Federal Trade Commission made representations to a court of appeals that a merger should be enjoined pending Commission proceedings, and if the court issued such an injunction, the Commission's ultimate determination would be uninfluenced by these powerful factors. I respectfully suggest that this is not a tolerable result.[15]

I come now to the case which the Court's opinion characterizes as "dispositive" of "this issue." *Whitney Bank* v. *New Orleans Bank*, 379 U. S. 411.[16] It is indeed a

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[15] The Court's opinion today eschews the result in *Arrow* and fastens instead on footnote 22, 372 U. S., at 671, which merely reserves judgment as to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . ." The footnote adds that "[s]uch power has been deemed merely incidental to the court's jurisdiction to review *final* agency action, and has *never* been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." (Emphasis supplied.) The cases cited demonstrate the conventional use of the extraordinary writs referred to in the footnote. In *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, a stay was issued ancillary to an appeal already taken pursuant to statute. Its purpose was to suspend, pending action by the court in which the appeal was lodged, changes authorized by completed agency action. For the thoroughly conventional nature of *Transamerica*, also cited in the footnote, see note 1, *supra*.

[16] *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675, cited by the Court in connection with its assertion

square holding on an issue that is not anywhere near the problem of this case. *Whitney* holds that a court of appeals may enter such orders as will protect its jurisdiction—*its jurisdiction having fully attached by a prior appeal from a final order of the Federal Reserve Board, in accordance with statute.* Briefly stated, the Federal Reserve Board had entered an order permitting a New Orleans bank to operate a subsidiary in Louisiana through a holding company. A petition to review that order was duly filed, pursuant to statute, in the Court of Appeals for the Fifth Circuit. While this was pending, Louisiana enacted a statute bearing on the problem. Meanwhile, the Comptroller of the Currency indicated that he would issue a certificate to the new bank. Competing banks filed in the District Court for the District of Columbia, an action for injunction against the Comptroller. The injunction was granted and the Court of Appeals for the District of Columbia affirmed. It was the latter action that was before this Court, on certiorari. This Court held that the District Court had no jurisdiction to pass on the merits of the controversy by enjoining the Comptroller; that exclusive jurisdiction as to the authorization of the new bank was vested in the Federal Reserve Board. But it stayed its mandate for 60 days to give the parties time to move in the Fifth Circuit for a remand to the Federal Reserve Board for reconsideration of its order in light of the subsequent Louisiana statute. On remand, the Court stated, "the Fifth Circuit's power to protect its jurisdiction is beyond question, *id.*, at 426—this in a case which had been in the Court of Appeals for three years following final agency action.

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that courts have power to preserve the *status quo* while administrative proceedings are in progress, relates instead to the power of a bankruptcy court to enjoin the sale of collateral pledged by a debtor.

This is entirely in accord with the traditional and established construction of the All Writs Act, and with the statute governing proceedings of the Federal Reserve Board. Jurisdiction had properly been acquired by the Court of Appeals for the Fifth Circuit. Of course, it had power to issue whatever orders were necessary to preserve its jurisdiction, pending remand or otherwise. The Court's statement that it is "analogous" to the relief requested by the Commission is simply in error. It is analogous only if we disregard the facts that in *Whitney*, a final order had been entered by the administrative agency, appeal taken and the jurisdiction of the Court of Appeals had attached. Whereas in the present case, none of these has occurred and we are bluntly asked to vest the courts of appeals with authority to consider issuing an injunction as a matter of original jurisdiction—without an agency order, without an appeal, and without statutory jurisdiction.

The net of the matter is simply, plainly and clearly that the decision of the Court in this case is novel—totally novel. It is in direct contravention of the careful, specific plan and directions of the Congress with respect to the administration of § 7 of the Clayton Act. It is in direct conflict with the purpose and office of the All Writs Act. It is totally unsupported by prior decisions of this Court and contrary to both *Roche, supra*, and *Arrow Transport, supra*. It is unwise in terms of the administration of § 7. It places an unwise, unjustified and disruptive burden on the courts of appeals and saddles them with original jurisdiction which they cannot properly exercise and a fact-finding function in elaborate, complex situations, which they should not be asked to undertake.

The courts of appeals are not courts of original jurisdiction. They have neither the facilities nor the institutional aptitude for determining in the first instance

whether a particular merger should be halted. This is always intensely a question of fact—hotly controverted—turning upon factual-economic problems such as the ascertainment of facts as to the "line of commerce," the "section of the country" and the probable effect upon competition. And these are questions committed in the first instance to the FTC and not to the courts. See *Whitney Bank* v. *New Orleans Bank, supra,* at 421.

Without any findings of the Commission or a court, the courts of appeals are now burdened with the task of deciding these questions. The fact of the matter is that the Court's decision commands the courts of appeals to be trial courts for purposes of those § 7 cases which the Commission chooses to bring before them. I share the view expressed by my Brother BLACK and joined by my Brother DOUGLAS that:

> "The business of trial courts is to try cases. That of appellate courts is to review the records of cases coming from trial courts below. In my judgment it is bad for appellate courts to be compelled to interrupt and delay their pressing appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work." *United States* v. *Barnett,* 376 U. S. 681, 724 (dissenting opinion).

Yet the responsibility today imposed upon appellate courts requires them to try cases. This is precisely what is required in determining whether a merger should be restrained during the years required to complete an FTC hearing on the merits.[17] Frequently, perhaps gen-

[17] The Commission's estimate in the present case that its proceedings would endure for at least one year seems unprecedentedly optimistic. In *A. G. Spalding & Bros., Inc.* v. *United States,* 301 F. 2d 585 (C. A. 3d Cir. 1962), where the FTC unsuccessfully sought an injunction *pendente lite,* more than seven years elapsed between complaint and enforcement. *Pillsbury Mills, Inc.* (FTC Docket

erally, to enjoin a merger "temporarily" is equivalent to entering a final order. The financial and commercial commitments involved in an agreement to acquire or to merge are apt to be so restrictive of the managerial flexibility of the parties, and so dependent upon transient circumstances, that they cannot be maintained *in limbo* while an FTC proceeding wends its leisurely way toward a wearying conclusion. Because the result of the application for temporary relief may be conclusive for all time, there is a discernible and understandable tendency on the part of the parties to put in a full case.[18]

Few § 7 cases are so simple that summary treatment is appropriate. See, *e. g., United States* v. *Bethlehem Steel Corp.*, 157 F. Supp. 877, 879 (summary judgment denied), 168 F. Supp. 576 (D. C. S. D. N. Y. 1958) (merger enjoined after full factual hearing). The risks involved in deciding an application for "preliminary" injunction on affidavits is so great that to invite it, as the Court here does, is to invite the administration of justice which is rough and ready, to say the least. On the other hand, to impel the courts of appeals to take testimony in these cases is an anomaly that should not be tolerated.

No. 6000) was in the Commission for eight and one-half years; *Crown Zellerbach Corp.* v. *F. T. C.*, 296 F. 2d 800 (C. A. 9th Cir. 1961), for nearly four years, and it was another four years before the Commission's order was affirmed. These delays were not unknown to Congress. See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 86 (1961).

[18] See *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (D. C. W. D. Pa.), aff'd, 320 F. 2d 509 (C. A. 3d Cir. 1863), where the hearing on an application for preliminary relief took five days. See also *United States* v. *FMC Corp.*, 218 F. Supp. 817 (D. C. N. D. Calif.), appeal dismissed, 321 F. 2d 534 (C. A. 9th Cir.), application for preliminary injunction denied, 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers).

This Court has recognized that there is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation. In *White Motor Co.* v. *United States*, 372 U. S. 253, the Court reversed summary judgment for the Government. It held that summary judgment was inappropriate and a trial should be had with respect to the Government's charge of illegal vertical territorial limitations. It specifically relied upon the "analogy from the merger field that leads us to conclude that a trial should be had." *Id.*, at 263. The Court said (per DOUGLAS, J.) that in cases "involving the question whether a particular merger will tend substantially to lessen competition" or whether "the acquired company was a failing one," "a trial rather than the use of the summary judgment is normally necessary." *Id.*, at 264. See also *United States* v. *Diebold, Inc.*, 369 U. S. 654, where factual issues paralleling those in the present case were held unsuitable for summary judgment.

Similarly, in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, this Court refused to permit reference of antitrust cases to a master. It held (per CLARK, J.) that "most litigation in the antitrust field is complex," and that this is "an impelling reason for trial before a regular, experienced trial judge" rather than a master. *Id.*, at 259.

By its decision today, however, this Court commands that these admittedly difficult, complex cases be heard and adjudicated by the courts of appeals on original applications for "temporary" injunctions. I cannot reconcile this result with the facts, with this Court's awareness of the complexity of the task, or with proper regard for the courts of appeals. Apart from the judicial problem which this invention creates, we must recognize that the interposition of the courts, without congressional direction, at the threshold of the administrative process

is contrary to the congressional plan and the reiterated holdings of this Court. As the Court said in *Arrow Transport, supra*, judicial "consideration," prior to final administrative adjudication, "would create the hazard of forbidden judicial intrusion into the administrative domain." 372 U. S., at 670. This Court's insistence upon the "primary jurisdiction" of administrative agencies illustrates its sensitivity to the point. The Court has even insisted that "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course." *Pan American World Airways* v. *United States*, 371 U. S. 296, 313, n. 19; see also *United States* v. *Western Pac. R. Co.*, 352 U. S. 59; *Far East Conference* v. *United States*, 342 U. S. 570; *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474.

The present case illustrates the profound difficulties that the Court of Appeals will face in reaching a decision, within the practical limits of its available time and procedures, as to whether it should issue a "preliminary" injunction. There are here sharp factual disputes concerning the financial status of Bowman and the availability to it of the so-called "failing company" defense. There is a claim that Dean Foods is about to lose its largest customer and that as a result the merged company will be smaller than Bowman was before the merger. And the bona fides of the "interested" prospective purchaser uncovered by the Commission's staff are in dispute.

The Court of Appeals will have to make a judgment concerning these issues, as well as the other, complex factors that are determinative. It will get little comfort from the label of the relief sought as "preliminary" because it will know that the patient may die while the "temporary" anesthesia is in effect. And it will know that, realistically, it has no control over the length of the proceedings—whether the Commission's hearings will

last a year or eight years, or something in between. By contrast, when the Department of Justice or a private person seeks a "preliminary" injunction in a district court, as provided by statute, the proceedings on the merits are in the same court. That court controls the proceedings, and it is admonished by the statute to proceed "as soon as may be, to the hearing and determination of the case." 15 U. S. C. § 25. This is an essential admonition, insisted upon by the Congress to mitigate the consequences of preliminary restraints imposed by the district courts upon effectuation of mergers. The courts of appeals will be in the unhappy position of either attempting to supervise Commission proceedings in the predictably vain effort to secure expedition, or of accepting the fact that the "preliminariness" of their order is totally subject to the destructive delays characteristic of Commission procedures. See Kaysen and Turner, Antitrust Policy 248–249 (1959).

In effect, today's decision represents radical surgery upon the administration of § 7 of the Clayton Act. This is done contrary to statute, without basis in law or precedent, and motivated by reasons, which while they may have superficial appeal, are unwise and disruptive. In effect, the Court condones and encourages the Commission to turn aside from its designated function as an expert, administrative agency to become a prosecutor and litigant.

When the Commission was established in 1914, it was not intended to duplicate the functions of existing agencies, but rather to bring to bear on the problems of antitrust and unfair competition the "specialized knowledge and expert judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods—[hopefully] characteristic of the administrative process." Elman, Rulemaking Procedures

in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387 (1965).

Every conceivable merger case involves the danger that the merger, unless enjoined, will be effectuated, and the incentive to the Commission to shop among the statutorily available courts of appeals and to seek "preliminary" injunctions will be great. This, I repeat, is a radical change from the pattern that Congress has ordered, and one which is profoundly undesirable in its effects upon the parties, the courts of appeals, and upon the national interest in a careful assessment of mergers for the purpose of tolerating those which are permissible and liquidating those which violate the national policy expressed in § 7.

I would affirm the decision below.

The FTC first solicited the assistance of Congress in 1956. In January of that year it submitted to the appropriate committees of the Eighty-fourth Congress a staff study containing various legislative proposals. The study observed that "A very serious loophole in the Antimerger Act [§ 7] is the lack of a provision which enables the Federal Trade Commission either to take action to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." [1]

The study informed the committees that in 1955 the FTC had twice sought to secure preliminary injunctions from courts of appeals, but that the courts had found no basis in existing law to authorize such applications.[2] In hearings conducted upon proposals of the FTC and others, the Commission through its then chairman, John W. Gwynne, urged Congress to enact legislation which would empower it in § 7 cases to apply to United States District Courts for preliminary relief.[3] Chair-

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[1] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., 29 (1956).

[2] The cases referred to were *Federal Trade Comm'n* v. *Farm Journal, Inc.* (C. A. 3d Cir. 1955) (unreported); and *The Matter of A. G. Spalding Bros., Inc.* (C. A. 1st Cir. 1955) (unreported). They are discussed in H. R. Rep. No. 486, 85th Cong., 1st Sess., 8–9 (1957); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., 42–45 (testimony of FTC Chairman Gwynne), 156–157 (testimony of Congressman Celler) (1958).

[3] The FTC proposed that § 11 of the Clayton Act be amended to read: "Whenever the Federal Trade Commission has reason to believe—

"(1) That any corporation is acquiring, has acquired or is about

man Gwynne was pessimistic about the prospects for success under the all-writs statute, noting that it "is a very general statute and is designed to protect not the jurisdiction of the Federal Trade Commission but the jurisdiction of the circuit court of appeals to which the case might finally get." [4]

Both Senate and House Judiciary Committees accepted the view, repeatedly stated by spokesmen for the FTC, that it lacked any authority to enjoin or seek a court order to enjoin mergers prior to an FTC adjudication of their illegality, and that this gap in the Commission's arsenal was crippling its efforts to enforce § 7. Both Committees reported out H. R. 9424, which contained an amendment to § 15 of the Clayton Act authorizing the FTC to seek preliminary relief in the United States District Courts. S. Rep. No. 2866, 84th Cong., 2d Sess. (1956); H. R. Rep. No. 1889, 84th Cong., 2d Sess. (1956).[5] The bill passed the House, but failed of passage in the Senate.

Similar legislative proposals have been introduced in subsequent sessions, but always with less success than in 1956. In all of these legislative proceedings, the position of the FTC has been steadfast: consistently, it has

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to acquire the stock or assets of another corporation in violation of the provisions of section 7 of this Act, and

"(2) That the enjoining thereof pending the issuance of a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

"the Commission . . . may bring suit in a district court of the United States . . . to prevent and restrain violation of section 7 of this Act. Upon proper showing a temporary injunction or restraining order shall be granted without bond. . . ." Hearings, *supra*, note 1, at 29–30.

[4] *Id.*, at 35.

[5] H. R. 9424, although worded in greater detail, was in substance like the FTC proposal.

insisted that without new legislation it lacks authority to enjoin mergers pending completion of agency action. In March of 1957, FTC Chairman Gwynne informed the appropriate Committees of the decision in *Federal Trade Comm'n* v. *International Paper Co.*, 241 F. 2d 372 (C. A. 2d Cir. 1956), that the all-writs statute would not support an FTC application for preliminary relief. To the House Committee he forwarded a copy of the opinion, describing it as "[e]ven more conclusive" than the earlier unreported decisions of the Courts of Appeals for the First and Third Circuits.[6] In the Senate, Chairman Gwynne characterized his Commission's application in *International Paper* as "something of a forlorn hope."[7] When Senator Kefauver, the Committee Chairman, asked him whether the FTC had sought review of the decision in this Court, Chairman Gwynne answered: "No, we did not. We talked that over. I could not help but agree with the court, frankly. I think the remedy is to amend the law. . . ." The Senator replied, "I think you are right about it."[8]

Nor was Gwynne the only FTC spokesman to represent to Congress that legislation was essential if the Commission, like the Department of Justice and private parties, was to be able to maintain the *status quo* pending determination of a merger's legality. The present chairman, Paul Rand Dixon, who as committee counsel had participated in Senate proceedings on this matter since 1956, informed the Eighty-seventh Congress that "It is clear that the Commission has no such authority," citing *International Paper*.[9] Leading Members of

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[6] Letter to Chairman Celler, in Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., 103 (1957).

[7] Hearings, *supra*, note 2, at 45.

[8] *Ibid.*

[9] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 87, 107 (1961). It

Congress [10] and key representatives of the Executive Branch [11] expressed the same view.

A third FTC Chairman, Earl Kintner, explained to the bar rather than directly to Congress, that in 1960 the FTC had intervened as *amicus curiae* in a private suit to enjoin a merger,[12] which suit paralleled a pending Commission inquiry. This was done, he said, because the FTC was "lacking any statutory authority to seek a temporary injunction." Kintner, The Federal Trade Commission in 1960—Apologia Pro Vita Nostra, 1961 Antitrust Law Symposium 21, 38. He noted that the FTC was pressing for legislative authorization, and that until the effort succeeded the FTC would be confined to intervention in occasional private suits and to reliance upon the Justice Department "where a temporary restraining order is particularly appropriate." *Id.*, at 41.[13]

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was in this session that the FTC abandoned its prior advocacy of proposals that it seek relief in the district courts, urging instead that it be given power to issue its own injunctions and restraining orders. *Id.*, at 88, 91. Compare testimony of FTC Chairman Gwynne, Hearings, *supra*, note 2, at 49–59.

[10] See, *e. g.*, statement of Congressman Celler, Hearings, *supra*, note 2, *supra*, at 156–160; statement of Congressman Patman, Hearings, *supra*, note 9, at 45; statement of Senator Kefauver, *id.*, at 46.

[11] *E. g.*, The President's Economic Report, submitted to Congress on January 3, 1957, p. 51; Letter from Attorney General Kennedy, May 2, 1961, in Hearings, *supra*, note 9, at 58.

[12] *Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177 (D. C. E. D. Mich.), aff'd, 280 F. 2d 747 (C. A. 6th Cir. 1960).

[13] FTC Chairman Dixon utilized the same forum the following year to plead for legislation which would authorize the Commission to issue its own temporary relief. See Dixon, The Federal Trade Commission in 1961, 1962 Antitrust Law Symposium 16, 19–21.